

SUPREME COURT
STATE OF LOUISIANA

DOCKET NO: 2021-CA-01414

WESTLAWN CEMETERIES, L.L.C.
VERSUS
THE LOUISIANA CEMETERY BOARD

CIVIL CASE

SUR-REPLY BRIEF

ON BEHALF OF
PLAINTIFF WESTLAWN CEMETERIES, L.L.C.,
AND INTERVENORS, AS TRUSTEES OF THE WESTLAWN
MEMORIAL PARK PERPETUAL CARE TRUST FUND

ON APPEAL FROM THE
TWENTY-FOURTH JUDICIAL DISTRICT COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA
DOCKET NUMBER 795-617
HONORABLE STEPHEN C. GREFER, PRESIDING

Respectfully submitted:

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Perpetual Care Trust Fund

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INTRODUCTION

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 (“Trustees”) respectfully submit this Sur-Reply Brief responding to the Reply Brief filed by the Appellant, the Louisiana Cemetery Board (“LCB” or “Board”).

In their Original Brief, Westlawn and the Trustees responded to the arguments in the LCB’s Original Brief and set forth their arguments in support of to the relief demanded in their Answer to Appeal filed herein. In its Reply Brief, the LCB raises arguments for the first time regarding the scope of its appeal and responds to certain arguments made by Westlawn and the Trustees in their Original Brief in support of the relief demanded in their Answer to Appeal. This Sur-Reply Brief is filed for the purpose of responding to those arguments.

After spending much of its Original Brief attempting, without evidence, to paint Westlawn in a bad light, the LCB complains that Westlawn addressed the LCB’s unwarranted attacks in its Original Brief by relying on facts that are actually supported by the record. The LCB also argues, for the first time, that because the LCB only appealed the June 29, 2021 judgment declaring L.A.C. 46:XIII.1503(C) facially unconstitutional the relief demanded by Westlawn and the Trustees in their Answer to Appeal is not properly before this Court because they did not file an independent appeal from the district court’s March 25, 2021 judgment on the cross-motions for summary judgment. As set forth below, the right of Westlawn and the Trustees to have the March 25, 2021 judgment reviewed cannot be limited by the LCB appealing for only an express or limited purpose.

ARGUMENT

I. The Court Should Reject the LCB’s Attempt to Limit the Scope of this Appeal.

This appeal arises out of the district court’s ruling on cross-motions for summary judgment filed by the parties. In its motion for summary judgment on its petition for declaratory judgment, Westlawn challenged the constitutionality of L.A.C. 46:XIII.1503(C) and L.A.C. 46:XIII.1505(A) and (B) on multiple grounds. The LCB filed a cross-motion for summary judgment seeking a ruling that Section 1503(C) and Section 1505(A) and (B) are constitutional.¹

¹ R. Vol. 1, pp. 129-130. The district court continued the hearing on the cross-motions for summary judgment pending a limited administrative hearing agreed to by the parties that the LCB later refused to hold.

The LCB clearly had every intention of having the district court decide the constitutionality of Section 1503(C) and Section 1505(A) and (B) until the LCB suddenly changed its mind and filed three writ applications attempting to have the declaratory judgment action dismissed. As a result of LCB's writs, the Fifth Circuit instructed the district court to first determine whether Westlawn enunciated facial or as-applied challenges to the regulations at issue and, if it found facial challenges, to render a declaratory judgment accordingly.²

On March 25, 2021, the district court granted the LCB's motion for summary judgment in part and denied Westlawn's motion for summary judgment by declaring that the challenged regulations are facially constitutional and remanded the case to the Board on the "as applied" constitutional challenges. On June 29, 2021, the district court reconsidered its prior ruling on the cross-motions and rendered a judgment granting Westlawn's Petition for Declaratory Judgment in part and declaring Section 1503(C) unconstitutional on its face because it violates the separation of powers clause and conflicts with other provisions of Title 8 of the Louisiana Revised Statutes.

On July 8, 2021, the LCB took a direct appeal to this Court pursuant to La. Const. Art. V, Section 5(D) on grounds that the June 29, 2021 judgment is a final judgment that declares Section 1503(C) unconstitutional. Westlawn and the Trustees timely answered the appeal seeking reversal and/or modification of the portions of the district court's March 25, 2021 judgment against Westlawn declaring that Section 1503(C) does not violate substantive due process rights on its face and that Section 1505(A) and (B) is facially constitutional.

In its Reply Brief, the LCB attempts to limit the scope of this appeal solely to the facial challenge to Section 1503(C) on grounds that the relief demanded by Westlawn and the Trustees in their Answer to Appeal cannot be considered because those matters are "the subject of a final judgment that Westlawn did not choose to appeal."³ The LCB fails to recognize the effect of the Answer to Appeal filed by Westlawn and the Trustees. The LCB cannot restrict Westlawn and the Trustees' right to have the Court review the constitutionality of Section 1505(A) and (B) as they have answered the LCB's appeal and specifically demanded this relief.

A party appeals by obtaining an order of appeal. *See* La. C.C.P. art. 2121. If the party against whom an appeal is taken does not desire any relief other than affirmance of the trial court's decision against the appellant, that party is not obligated to answer the appeal; the appellee may

² R. Vol. 3, p. 518 (Fifth Circuit Court of Appeal Decision).

³ *See* the LCB's Reply Brief, at p. 1.

simply brief and argue the issues. *See* La. C.C.P. art. 2133A. A party who was successful in the trial court may urge in support of a judgment in an appellate court, including the supreme court, any argument supported by the record, although the party has not appealed, answered the appeal, or applied for supervisory writs. *See* La. C.C.P. art. 2133B.

If the appellee desires any affirmative relief not granted by the judgment, however, he must answer the appeal. La. C.C.P. art. 2133. The answer filed by the appellee is the equivalent of an appeal on his part as to those portions of the judgment rendered against him and in favor of the appellant and of which he complains of in his answer. La. C.C.P. art. 2133A; *Francois v. Ybarzabal*, 469 So.2d 1001, 1004 n.2 (La. App. 5th Cir. 1985), *writ granted*, 476 So.2d 337 (La. 1985), and *aff'd*, 483 So.2d 602 (La. 1986).

The jurisprudence is well settled that an appellee's right to have the judgment reviewed by answering the appeal cannot be taken away from him by the appellant appealing only for an express and specific, or limited purpose. *See Monk v. Veillon*, 309 So.2d 377 (La. App. 3 Cir.1975); *City of Shreveport v. Kahn et al.*, 194 La. 55, 193 So. 461 (1939); *Alengi et al. v. Hartford Accident & Indemnity Co. et al.*, 183 La. 847, 165 So. 8 (1935); *Warren v. Fidelity Mutual Insurance Company*, 99 So.2d 382 (La. App. 1 Cir. 1957); *Milner v. Louisiana Public Utilities, Inc.*, 1 So.2d 443 (La.App.1st Cir., 1941); *Glass v. Holomon*, 197 So. 438 (La. App. 2 Cir. 1940). Under Louisiana jurisprudence if an appellant takes a limited appeal, this does not preclude the appellee from raising any other points on appeal by answer, even though such points are not embraced in the appellant's appeal as taken. *Alengi, supra*; *City of Shreveport v. Kahn*, 194 La. 55, 193 So. 461 (1939).

According to the Louisiana Civil Law Treatise on Civil Procedure, “[a] plaintiff seeking a declaratory judgment of the unconstitutionality of a statute or an ordinance on two grounds need not ‘protectively’ appeal from a judgment declaring the ordinance unconstitutional on only one of the asserted grounds.”⁴ On the defendant's appeal, the plaintiff is permitted to argue both grounds in support of the judgment, whether the trial court rejected, pretermitted or ignored the second argument.⁵

Here, the LCB took a direct appeal to this Court of the district court’s judgment declaring Section 1503(C) unconstitutional on its face. Under Article 5, Section 5(D) of the Louisiana

⁴ Frank L. Maraist and Harry T. Lemmon, 1 LOUISIANA CIVIL LAW TREATISE, *Civil Procedure* §14.11 (West 2021).

⁵ *Id.*; citing *Mire v. City of Lake Charles*, 540 So. 2d 950 (La. 1989).

Constitution of 1974, a case shall be appealable to the supreme court if a law has been declared unconstitutional. *See Church Point Wholesale Beverage Co., Inc. v. Tarver*, 614 So.2d 697, 700 (La. 1993). Subsection (F) of Article 5, Section 5 provides that if the supreme court has appellate jurisdiction under Section 5, then that jurisdiction may extend over all issues involved in the civil action before it which have been ruled on by the trial court. *Id.* at 700-01. In this case, the trial court ruled in its March 25, 2021 judgment that Section 1503(C) and 1505(A) and (B) were facially constitutional but later reconsidered its ruling and declared Section 1503(C) facially unconstitutional because it violates the separation of powers clause. Thus, the trial court clearly ruled on the constitutionality of Section 1505(A) and (B).

In the event that this Court exercises its appellate jurisdiction over this matter, the Court should consider the relief demanded in the Answer to Appeal filed by Westlawn and the Trustees as an answer to an appeal is equivalent to an appeal of the portions of the district court's March 25, 2021 judgment rendered against them and in favor of the LCB. The LCB's argument seeking to limit the scope of this appeal to the constitutionality of Section 1503(C) and prevent any argument with respect to the constitutionality of Section 1505(A) and (B) has no merit.

Even if the Court declines to exercise appellate jurisdiction and does not consider the relief demanded in the Answer to Appeal, the Court still has supervisory jurisdiction to consider and affirm the judgment of the district court declaring Section 1503(C) facially unconstitutional. *See Herlitz Const. Co., Inc. v. Hotel Inv'rs of New Iberia, Inc.*, 396 So.2d 878 (La. 1981) ("A court of appeal has plenary power to exercise supervisory jurisdiction over district courts and may do so at any time, according to the discretion of the court."); *see also Progressive Sec. Ins. Co. v. Foster*, 97-2985, p. 2 (La.4/23/98), 711 So.2d 675, 678 at note 3.⁶

II. The Parties Developed a Factual Record in the District Court.

As this direct appeal involves a facial challenge to Section 1503(C), the constitutional challenge to the regulation on separation of powers grounds can be decided by applying the applicable law to the text of the regulation and the statutory provisions found in Title 8. Instead of addressing the substantive arguments on separation of powers made by Westlawn and the Trustees, the LCB now argues that the district court erred by declaring Section 1503(C) facially

⁶ Westlawn and the Trustees have already set forth in their Answer to Appeal the reasons it is appropriate for this Court to exercise its supervisory jurisdiction over this matter should it decline to exercise appellate jurisdiction.

unconstitutional because the facts were not fully developed in the district court. This argument is a red herring and is also contradicted by the record.

Contrary to the LCB's assertions, the parties conducted extensive discovery, including four depositions, and then filed cross-motions for summary judgment accompanied by statements of uncontested material fact. The LCB now refers to the depositions taken in this case, which are in the record on appeal, as "*pre-litigation* depositions."⁷ The LCB further asserts that the sworn deposition testimony of the LCB witnesses in this matter and admitted as evidence in support of Westlawn's motion for summary judgment is "not in evidence."⁸

The LCB had the opportunity to and did take discovery in this case prior to filing a cross-motion for summary judgment to have the constitutionality of the challenged regulations decided. The LCB waived any argument that the constitutional challenges asserted by Westlawn are premature or not ripe for judicial review when it answered Westlawn's petition for declaratory judgment and filed its cross-motion for summary judgment seeking a ruling on the constitutionality of the regulations at issue. In the Fifth Circuit's order from its review of the LCB's writ applications, it correctly held that the district court had original jurisdiction to determine whether the rules in question are constitutionally valid on their face.⁹ The LCB's argument that an administrative hearing is required to develop a factual record before the Board prior to any judicial review of the facial constitutionality of the regulations at issue is contrary to the law and was clearly waived when the LCB filed its cross-motion for summary judgment.

III. Section 1503(C) Requires a Cemetery to Forfeit Trust Income it is Entitled to Receive and Use to Maintain the Cemetery.

Forfeiture includes the "loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty."¹⁰ The adoption of fines, penalties and forfeitures are a primary legislative function that cannot be delegated to an administrative agency. *State v. Alfonso*, 99-1546, (11/23/99), 753 So.2d 156, 160 (La. 1999). An administrative record is unnecessary to review a facial constitutional challenge to a regulation that authorizes fines, penalties or forfeiture. *See Mid-City Automotive, LLC v. Dept. of Pub. Safety and Corrections*, 218-056 (La. App. 1 Cir. 11/7/18), 267 So.3d 165, 175.

⁷ See the LCB's Reply Brief, at p. 1 (emphasis in original).

⁸ *Id.* at pp. 4-5. La. C.C.P. art. 966A(4) provides, in pertinent part, that the only documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions.

⁹ R. Vol. 3, pp. 517 (Fifth Circuit Court of Appeal Decision).

¹⁰ *Forfeiture*, Black's Law Dictionary (11th ed. 2019).

The LCB takes a strawman approach by repeatedly stating that Westlawn argues it is the owner of income generated by the perpetual care trust.¹¹ The LCB then argues that Westlawn does not own the trust income and, as such, there can be no forfeiture of any right held by Westlawn in the income that the LCB demands Westlawn return to the principal of the trust.¹² It is clear from its Original Brief that Westlawn is not claiming to be the owner of the income generated by the perpetual care trust fund. Indeed, Westlawn and the Trustees explained that the ownership of the perpetual trust funds is with the Trustees of the perpetual care trust. This Court has held that title to the trust property vests in the trustee alone, and a beneficiary has no title to or ownership interest in trust property...” See *Bridges v. Autozone Properties, Inc.*, 04–0814 (La.3/24/05), 900 So.2d 784, 796-97.

Title 8 requires that all income generated by the perpetual care trust be used solely for the care of the cemetery spaces sold with a provision for perpetual care. See La. R.S. 8:454.1. There is no provision in Title 8 that gives consumers who purchase a cemetery space with a provision for perpetual care the right to receive any income from the perpetual care trust or identifies consumers as the income beneficiary of the trust.

Under Title 8 and the applicable regulations it is clear that the cemetery authority is the only party with the right to receive the income distributed from the trust fund for the purposes of providing perpetual care to the cemetery. Indeed, L.A.C. 46:XIII.1503(B) provides that “[t]he net income, after the deduction of costs associated with the operation of the trust, may be remitted to the cemetery for care and maintenance of the cemetery as provided for by title 8.” The owners of the cemetery spaces are third party beneficiaries of Westlawn’s obligation to maintain the cemetery with income received from the trust.

The LCB’s argument that Westlawn, as the cemetery authority, has no right to the income generated by the perpetual care trust is unsupported and unconvincing. Depriving the cemetery of the trust income by converting the income to principal clearly acts as a penalty to the cemetery or a forfeiture of its right or privilege recognized by law to use the income to keep the cemetery well-maintained at all times.

Furthermore, Title 8 specifically sets forth the penalties that can be applied to a cemetery authority that violates the provisions of Title 8. See La. R.S. 8:460. The statute does not provide

¹¹ See the LCB’s Reply Brief, at pp. 5-6.

¹² *Id.*

for the conversion of trust income to principal under any circumstances. The LCB, as an administrative body, is without authority to adopt and enforce a rule requiring a cemetery authority to forfeit income distributed to it and used for the maintenance of the cemetery spaces sold with a provision for perpetual care. *See Alfonso, supra* at 160.

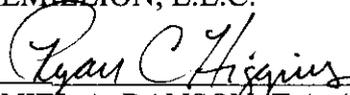
Westlawn has the right to receive the income generated by the perpetual care trust, which income the LCB now argues Westlawn must return to the principal of the trust based on the 120-day distribution rule in Section 1503(C). This forfeiture provision enunciated in Section 1503(C) is an exercise of legislative authority by an administrative body and, therefore, violates the separation of powers clause.

CONCLUSION AND PRAYER FOR RELIEF

The district court's judgment declaring Section 1503(C) unconstitutional on its face should be affirmed. If the Court exercises appellate jurisdiction over this matter, the Court should consider the relief demanded in the Answer to Appeal and, in addition to affirming the district court's judgment declaring Section 1503(C) facially unconstitutional for violating the separation of powers clause, the Court should also declare Section 1505(A) and (B) and Section 1503(C) unconstitutional for the reasons set forth in the Original Brief filed by Westlawn and the Trustees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Sur-Reply Brief has been forwarded to counsel of record for all parties via facsimile, electronic mail, and/or by depositing same in the U.S. mail, postage prepaid and properly addressed, on this 22nd day of December, 2021.



RYAN C. HIGGINS

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