IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

E N V I R O N M E N T A L C O N F E D E R A T I O N O F SOUTHWEST FLORIDA, INC., and MANASOTA-88, INC.,

Appellants,

v.

IMC PHOSPHATES, INC. and FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellees.

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CASE NO. 1D03-1717

Opinion filed October 28, 2003.

An appeal of an order of the Department of Environmental Protection.

David G. Guest and Aliki Moncrief, Tallahassee, for Appellants.

Steven L. Brannock and Sarah C. Weinzierl of Holland & Knight, LLP, Tampa and Lawrence E. Sellers, Jr., of Holland and Knight, Tallahassee, for Appellees.

ON REHEARING

PADOVANO, J.

IMC Phosphates contends that the decision in this case conflicts with the recent decision of the court in Environmental Confederation of Southwest Florida, Inc., Manasota-88 v. State of Florida, Department of Environmental Protection , 852 So.

2d 349 (Fla. 1st DCA 2003), a case presenting a constitutional challenge to the same statute. There, the court dismissed an appeal from a final order in an action for declaratory relief, on the ground that the single subject issue had been rendered moot by a reenactment of the statute in 2003.

The essential difference is that the appeal in this case is an appeal from an adverse decision made under the authority of the statute, before the alleged defect in the statute was corrected. This is not an abstract issue like the one remaining in the declaratory judgment case in the wake of the reenactment. Whether the statute violated the single-subject rule before it was reenacted is a question that is not a proper subject for declaratory relief. The answer to that question is purely academic. In contrast, the issue in this case involves a use of the statute at a time when it was alleged to be unconstitutional. The statute was employed to deny the Confederation and Manasota-88 the right to initiate a challenge to a proposed permit.

In the present case, the issue would be moot only if the statute as reenacted in 2003 can be applied retroactively to the date of denial. We need not explore this point, however, because IMC Phosphates has yet to make a proper claim that the appeal in this case is moot. The only argument made in the motion to dismiss the appeal was that the Confederation and Manasota-88 lacked standing. We addressed that claim in the main opinion. IMC Phosphates' current argument that the appeal is moot was

presented to this court for the first time in its motion for rehearing. The mootness argument could have been made much earlier in this case, as it apparently was in the declaratory judgment case.

IMC Phosphates is not in a position to seek rehearing on the ground that the court overlooked or misunderstood its argument; the argument simply was not made. Rule 9.330 of the Florida Rules of Appellate Procedure states in material part that a motion for rehearing "shall not present issues not previously raised in the proceeding." By the authority of this rule, we deny IMC Phosphates' motion for rehearing.

The Department of Environmental Protection has also filed a motion for rehearing. This motion refers only to matters that were properly before the court, but it does not reveal any error in the decision. Accordingly, we deny the Department's motion for rehearing, as well.

POLSTON, J., CONCURS. ERVIN, J., DISSENTS WITH OPINION.

ERVIN, J., dissenting.

Although I will not restate what I said in my original dissent to the majority's opinion, I consider it important to discuss an issue raised in appellee IMC Phosphates Company's motion for rehearing and rehearing en banc, which IMC did not have the opportunity to mention in its initial motion to dismiss. Appellee points out that subsequent to this court's decision, another panel of this court dismissed the appeal of the same appellants in a companion case, because appellants' single-subject constitutional challenge to section 403.412(6), Florida Statutes, had become moot due to the legislature's readoption of the Florida Statutes on July 1, 2003. Fla. Envtl. Confed'n of S.W. Fla., Inc. v. Dep't of Envtl. Protection, 852 So. 2d 349 (Fla. 1st DCA 2003) (Environmental Confederation II).

IMC argues that there is no more practical reason to be served by allowing the appeal to proceed in this case than there was in the companion case, and I agree. In both appeals, appellants have sought nothing more than a decision from this court declaring that the statute restricting standing violates the constitution's demand that every law embrace but one subject. The majority in the present case, in refusing to dismiss the appeal, takes the position that the issue before this court in the declaratory-judgment suit was only abstract, apparently because the case had not yet ripened into a case in controversy, unlike the present appeal, in which the statute was used as the

basis for denying appellants' right to challenge a proposed permit application as parties, before the alleged single-subject defect had been cured by its readoption.

I am unaware of any language in Environmental Confederation II that supports a conclusion that the reason the panel there dismissed the appeal was due to the lack of an existing controversy between the parties. In fact, the panel acknowledged "that appellants [had] initiated their challenge during the window period for raising a single subject claim, [but] they have failed to articulate any practical purpose that would be served by allowing this appeal from the denial of declaratory and injunctive relief to continue now that the window period has closed." Id. at 350. Thus, despite the clearly established rule that a law passed in violation of the single-subject requirement remains invalid until reenacted, and despite the initiation of the suit before the statute's readoption, the panel in Environmental Confederation II essentially concluded there were no facts appellants could allege that would make their challenge viable. Although the opinion does not state why there is a lack of any practical reason for the appeal not to proceed, it is inconceivable to me that the court based its decision on the absence of a controversy that had either not been alleged or was incapable of being alleged. In so concluding, I have relied on the records in both the present appeal and in Environmental Confederation II, which may be judicially noticed. See Sinclair v. State,

28 Fla. Weekly D2027 n.2 (Fla. 1st DCA Aug. 29, 2003). The pertinent facts in both cases are hereafter summarized.

In Environmental Confederation II, appellants, on August 14, 2002, filed their declaratory-judgment suit, asserting the constitutional invalidity of section 403.412(6), Florida Statutes (2002). They amended their complaint on December 18, 2002, to allege, among other things, their intent to file a challenge to a notice of a mining permit they anticipated would be issued within the very near future. They further alleged such challenge would be barred if the newly enacted statute restricting standing were held constitutional. Thereafter, both appellants and the Department of Environmental Protection (DEP) filed motions for summary judgment. Appellants asserted in an affidavit supporting their motion that they had, after filing their complaint, received notice of DEP's intent to issue the mining permit, and that they were preparing an immediate challenge to the permit. Although the challenge had not been perfected by the time of the hearing for summary judgment, appellants asked the trial court to judicially notice that they had filed their administrative challenge to the permit notice on February 11, 2003. On March 4, 2003, the court entered summary judgment for DEP and dismissed appellants' complaint with prejudice, holding that they had failed to allege an injury in fact that would state a case or controversy sufficient to bring an action for declaratory judgment, and that section 403.412(6) did not violate the single-

subject requirement. Regarding the first reason for dismissal, the trial court explained: "Because the plaintiffs fail to present any concrete case in which they are precluded from participating in an administrative proceeding due to the new requirements, they fail to state a case or controversy within this Court's declaratory judgment subject matter jurisdiction." The "concrete case" the court alluded to occurred the following month, when, during the pendency of the appeal from the complaint's dismissal, DEP, on April 22, 2003, entered the order at issue in this appeal, dismissing appellants' challenge to the mining permit due to their lack of standing as a result of the more restrictive standing requirements of section 403.412(6).

Appellants recited the above facts in their brief in Environmental Confederation II, and they are supported by the record. I consider it reasonably clear that the lower court erred in ruling that because appellants failed to show they had received an administrative denial of their challenge to the mining permit, they were unable to establish the existence of an actual case or controversy. The rule is firmly established that a suit for declaratory judgment will be entertained where claims are "'present and indicative of threatened litigation in the immediate future, which seems unavoidable, even though the differences between such parties as to their legal rights have not reached the stage of an actual controversy.'" Ready v. Safeway Rock Co., 157 Fla. 27, 24 So. 2d 808, 811 (1946) (Brown, J., concurring) (quoting 16 Am. Jur. § 10 at

282). Accord Hardwick v. Moore, 795 So. 2d 970, 972 (Fla. 1st DCA 2001) ("[I]n an action for declaratory judgment, the plaintiffs need only show an imminent controversy."). Indeed, the statute pertaining to declaratory judgments itself provides that such relief "may be rendered by way of anticipation with respect to any act not yet done or any event which has not yet happened." § 86.051, Fla. Stat. (2002).

It is abundantly obvious in the record that appellants were able to show an "imminent controversy." Consequently, I doubt very much that the panel's dismissal of the appeal in Environmental Confederation II was grounded on the trial court's reasoning. Even if the trial court was correct, a case in controversy had clearly ripened after appellants' appeal from the summary judgment, when DEP entered the administrative order dismissing appellants' challenge, a fact of which appellants had informed the panel in Environmental Confederation II. Nevertheless, the panel essentially decided that even if the statute could be considered to violate the single-subject requirement, appellants had not alleged, nor could they amend their complaint to allege, any conceivable set of facts that would establish a legal cause of action.

The only rational explanation for the panel's ruling is, as the majority briefly mentioned above, that the appeal would become moot if section 403.612(2) applied retroactively to the date of the denial of appellants' challenge. Under such theory, it

would be immaterial whether the 2002 statute violated the single-subject requirement, if the statute, when readopted in 2003, were determined to be procedural rather than substantive. The rule has long been established that procedural or remedial statutes are applied retroactively to acts preceding the effective date of their enactment. See Sullivan v. Mayo, 121 So. 2d 424 (Fla. 1960). Statutes are procedural that define the proper parties in suits litigating substantive rights. See Avila S. Condo. Ass'n v. Kappa Corp., 347 So. 2d 599, 608 (Fla. 1977); Fla. Wildlife Fed'n v. Dep't of Envtl. Regulation, 390 So. 2d 64, 67 (Fla. 1980).

This court's opinion in Rothermel v. Florida Parole & Probation Commission, 441 So. 2d 663 (Fla. 1st DCA 1983), approved sub nom. Griffith v. Florida Parole & Probation Commission, 485 So. 2d 818 (Fla. 1986), is highly illustrative of the above rule. There the court was asked to decide whether it retained jurisdiction over an appeal taken from an order that had preceded the effective date of an amendment to section 120.52(10), Florida Statutes (Supp. 1982), which denied inmates' standing to participate as parties to certain proceedings, as well as their right to seek administrative review from orders entered in such proceedings. Noting that the legislature did not expressly state whether the statute was intended to operate prospectively or retrospectively, the court continued:

> Since no clear intent is expressed in the subject legislation, its provisions will apply retrospectively if they are remedial or procedural and do not affect substantive or vested rights. There can be little doubt that the relevant portions of Chapter 83-78 are of the kind which affect only remedial or procedural statutory provisions. It is generally recognized that no vested rights exist as to a particular remedy or mode of procedure.

Id. at 664. The court thereupon applied the rule that cases which remain pending on appeal are affected by legislative acts pertaining to remedy or procedure, and dismissed the appeal.

I acknowledge, as the majority observes, that appellees have not raised any specific contention in their motion to dismiss that the appeal has now become moot because section 403.412(6) should be applied retroactively. Neither, for that matter, did appellees assert such issue before the panel in Environmental Confederation II. Nevertheless, a court's lack of jurisdiction over an appeal is obviously one that it may *sua sponte* notice. See Johnson v. State, 852 So. 2d 351 (Fla. 1st DCA 2003); Duszlak v. Wands, 803 So. 2d 779 (Fla. 1st DCA 2001); Keel v. State, 790 So. 2d 563 (Fla. 1st DCA 2001). Because a statute's application is not dependent upon the posture of the appeal, *i.e.*, whether by direct appeal from an administrative order, or from a circuit court's order, I am of the firm belief that this panel should, without further delay, determine, as did the panel in Environmental Confederation II, that this

appeal should be dismissed as moot because no practical reason would be served by allowing it to continue.