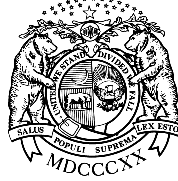

In the Missouri Court of Appeals
Eastern District

DIVISION FOUR

CITY OF RICHMOND HEIGHTS,	)	No. ED95791
	)	
Appellant,	)	Appeal from the Circuit Court of St. Louis County
vs.	)	
	)	Honorable Richard C. Bresnahan
RUTH L. GASWAY, et al,	)	
	)	
Respondent.	)	Filed: September 20, 2011

In this condemnation action, the City of Richmond Heights questions the constitutionality of two state statutes, Sections 523.039 and 523.061, which provide for additional compensation where a homestead taking occurs. The City contends that application of these two statutes violates the "just compensation" provision of Article I, section 26 of the Missouri Constitution. We hold that the Missouri Supreme Court has exclusive appellate jurisdiction of this case. Accordingly, we transfer the case to the Missouri Supreme Court.

Factual and Procedural Background

The City of Richmond Heights, as part of its Hadley Township Redevelopment Plan, sought to acquire a certain parcel of property belonging to Lillian Gasway.[1] The sought-after property, situated within the redevelopment area, is located at 1517

[1] The Hadley Township is an area generally bounded by Highway 40/Interstate 64 and Dale Avenue on the North, West Bruno Avenue on the South, Laclede Station Road on the East and Hanley Road on the West.

Banneker Road, near the intersection of Highway 40 and Hanley Road. Ms. Gasway purchased the property, and the house located thereon, over twenty-five years ago. Ms. Gasway has lived in and made numerous improvements to her home since that time.

After the City was unsuccessful in reaching an agreement with Ms. Gasway for the purchase of her home, the City obtained a condemnation order. The Commissioners assessed damages for the appropriation of Ms. Gasway's home at $264,717.00. Both the City and Ms. Gasway filed exceptions to the Commissioner's report. The parties then proceeded to a jury trial on the exceptions. The jury assessed Ms. Gasway's damages at $300,000.00. The trial court, at the behest of Ms. Gasway, and pursuant to Sections 523.039 and 523.061, found that a homestead taking had occurred and therefore increased the jury's award by an additional 25%, or $75,000.[2, 3] The court also awarded

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[2] A "homestead taking" is defined by Section 523.001 as:

> any taking of a dwelling owned by the property owner and functioning as the owner's primary place of residence or any taking of the owner's property within three hundred feet of the owner's primary place of residence that prevents the owner from utilizing the property in substantially the same manner as it is currently being utilized.

[3] Section 523.039 reads in pertinent part:

> In all condemnation proceedings filed after December 31, 2006, just compensation for condemned property shall be determined under one of the three following subdivisions, whichever yields the highest compensation, as applicable to the particular type of property and taking: …
> (2) For condemnations that result in a homestead taking, an amount equivalent to the fair market value of such property multiplied by one hundred twenty-five percent; ….

Section 523.061 reads:

> After the filing of the commissioners' report pursuant to section 523.040, the circuit judge presiding over the condemnation proceeding shall apply the provisions of section 523.039 and shall determine whether a homestead taking has occurred and shall determine whether heritage value is payable and shall increase the commissioners' award to provide for the additional compensation due where a homestead taking occurs or where heritage value applies, in accordance with the just compensation provisions of section 523.039. If a jury trial of exceptions occurs under section 523.060, the circuit judge presiding over the condemnation proceeding shall apply the provisions of section 523.039 and shall determine whether a homestead taking has occurred and shall determine whether heritage value is payable and shall increase the jury verdict to provide for the additional compensation due where a homestead taking occurs or where heritage value applies, in accordance with the just compensation provisions of section 523.039.

prejudgment interest, and then entered judgment in favor of Ms. Gasway, in the total amount of $413,519.92.

The City appeals. In addition to several evidentiary issues, the City challenges the constitutionality of Sections 523.039 and 523.061. Specifically, the City contends that adding 25% to the jury award, pursuant to these two statutory sections, for homestead value, violates Article I, section 26 of the Missouri Constitution, in that such an enhanced award exceeds "just compensation" for the property.[4] The City, citing to the Missouri Supreme Court's decision, *City of St. Louis v. Union Quarry & Construction Company*, 394 S.W.2d 300 (Mo. 1965), insists that the "just compensation" referred to in this constitutional provision is the fair market value of the property only, and no more.[5]

Discussion

This Court has the duty of examining our jurisdiction in every case. *Sharp v. Curators of University of Missouri*, 138 S.W.3d 735, 737 (Mo. App. E.D. 2003). Article V, section 3 of the Missouri Constitution provides that the Court of Appeals has general appellate jurisdiction in all cases except those within the exclusive appellate jurisdiction

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[4] Article I, section 26 of the Missouri Constitution provides:

> That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken.

[5] In particular, the City relies on the following passage from the Supreme Court's *Union Quarry* decision:

> The ultimate objective in this case, as in all condemnation cases, is to enforce the constitutional mandate 'That private property shall not be taken or damaged for public use without just compensation.' Constitution, Art. I, § 26. 'Just compensation' means the full and perfect equivalent in money of the property taken, but no more, for to award more than the value of the condemned property would result in the unjust enrichment of the condemnee. The 'just compensation' referred to, generally speaking, is the 'fair market value' of the property at the time of the taking. The fair market value of land is what a reasonable buyer would give who was willing but did not have to purchase, and what a seller would take who was willing but did not have to sell.

Union Quarry, 394 S.W.2d at 305 (internal citations omitted).

of the Supreme Court. Among the cases that fall within the Supreme Court's exclusive appellate jurisdiction are those involving the validity of a state statute. Mo. Const. art. V, sec. 3; *Glass v. First Nat. Bank of St. Louis, N.A.*, 186 S.W.3d 766 (Mo. banc 2005). The City challenges the validity of Sections 523.039 and 523.061. On its face, the City's challenge to these state statutes falls within the Supreme Court's exclusive appellate jurisdiction.

This, however, does not end our inquiry. The mere assertion that a statute is unconstitutional does not alone deprive this Court of jurisdiction. *Glass*, 186 S.W.3d at 766. If a party has not properly preserved its constitutional claim for appellate review, jurisdiction is vested in this Court, not the Supreme Court. *See, e.g., State v. Bowens*, 964 S.W.2d 232, 236 (Mo. App. E.D. 1998); *Christiansen v. Fulton State Hospital*, 536 S.W.2d 159, 160 (Mo. banc 1976). And the Supreme Court will not entertain the appeal if the allegation is pretextual; the allegation concerning the constitutional validity of the statute must be real and substantial for jurisdiction to vest in the Supreme Court. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 51 (Mo. banc 1999). If the challenge is merely colorable, this Court has jurisdiction. *Glass*, 186 S.W.3d at 766. We address each condition in turn.

To properly preserve a constitutional issue for appellate review, a party must raise the issue at the earliest opportunity and preserve the issue at each step of the judicial process. *Sharp*, 138 S.W.3d at 738. To begin, a party must raise the constitutional issue in the trial court at the earliest opportunity that good pleading and orderly procedure will permit given the circumstances. *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 701 (Mo. banc 2008). "This rule is necessary to prevent surprise to the

opposing party and to allow the trial court the opportunity to identify and rule on the issue." *Id*. Additionally, the issue must not only have been presented to the trial court, but the trial court must have ruled on the issue. *Estate of McCluney*, 871 S.W.2d 657, 659 (Mo. App. W.D. 1994). Further, the party must specifically designate the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself, and the party must state the facts showing the violation. *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004). And the party must preserve the constitutional question throughout the proceedings. *Id*. For instance, as pertains to this case, the point raised on appeal must be based upon the theory advanced at the trial court. *Bowens*, 964 S.W.2d at 236.

From the record before us, it appears the City has properly raised and preserved the issue of the validity of Sections 523.039 and 523.061 for appellate review. The issue of increasing the jury award did not enter the case until after trial when, upon Ms. Gasway's motion, and pursuant to the statutory sections in question, the court found that a homestead taking had occurred and therefore increased the jury's award by an additional 25%.[6] The City raised its constitutional challenge in its motion for new trial, specifically designating the statutory and constitutional provisions in question, and setting forth the facts from the case that formed the basis of its challenge. The trial court denied the City's motion, implicitly ruling that the statutes were constitutional. *See Champlin Petroleum Co. v. Brashears*, 592 S.W.2d 545, 547 (Mo. App. W.D. 1979)(citing *State ex rel. State Highway Comm'n v. Wiggins*, 454 S.W.2d 899, 902 (Mo. banc 1970)). Ms. Gasway had the opportunity to respond and the trial court had the

[6] Ms. Gasway filed her motion requesting the court to find that a homestead taking had occurred, and then to increase the jury verdict pursuant to Sections 523.039 and 523.061, on the day of trial.

opportunity to address the issue; thus the purposes of the rule were met. *See Call v. Heard*, 925 S.W.2d 840, 847 (Mo. banc 1996). Further, the City has carried through and raised the same issue on appeal.[7] We hold that the City has adequately raised and preserved this constitutional issue for appellate review. *See Id.*

We also hold that the City's claim is real and substantial. A claim is real and substantial when:

> upon preliminary inquiry, the contention discloses a contested matter of right, involving some fair doubt and reasonable room for controversy; but, if such preliminary inquiry discloses the contention is so obviously unsubstantial and insufficient, either in fact or law, as to be plainly without merit and a mere pretense, the claim may be deemed merely colorable.

Sharp, 138 S.W.3d at 735. Our Supreme Court has stated that "[o]ne clear indication that a constitutional challenge is real and substantial and made in good faith is that the challenge is one of first impression with this Court." *Rodriguez*, 996 S.W.2d at 52. Here, the City's contention – that application of Section 523.039 and 523.061 violates the "just compensation" provision of Article I, section 26 of the Missouri Constitution – has never been decided by any Missouri court. And, the *Union Quarry* case cited by the City, though decided prior to the enactment of Sections 523.039 and 523.061, appears at first blush to support the City's argument that the "just compensation" referred to in the constitution is the fair market value of the property, and no more. *Union Quarry*, 394 S.W.2d at 305. Hence, we conclude that the City's challenge is real and substantial, and not merely colorable.

Concluding, this case involves a challenge to the validity of a Missouri state statute. The City has properly raised and preserved the issue for appellate review. The

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[7] The City has raised other constitutional challenges. We leave the questions of their preservation and resolution to the Supreme Court.

City's claim is real and substantial, and not merely colorable. Thus we hold that this case falls within the exclusive appellate jurisdiction of the Missouri Supreme Court. Accordingly, this Court lacks jurisdiction and we are without the power to reach any issue in the case, including the evidentiary issues raised on appeal. *Sharp*, 138 S.W.3d at 739. As the Missouri Supreme Court has made clear, if the Supreme Court has exclusive appellate jurisdiction of a case, its jurisdiction extends to all issues in the case. *Id.* (citing *State ex rel. State Highway Comm'n v. Wiggins*, 454 S.W.2d 899, 902 (Mo. banc 1970) and *State ex rel. Union Elec. Co. v. Public Service Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985)).

We order the case transferred to the Missouri Supreme Court where jurisdiction lies. Mo. Const. art. V, sec. 11.

LAWRENCE E. MOONEY, JUDGE

PATRICIA L. COHEN, P.J., and
GEORGE W. DRAPER III, J., concur.