Court of Appeals, State of Michigan

ORDER

Anita Sheardown v Janine Guastella

Docket No. 338089

LC No. 2016-846855-DC

Christopher M. Murray
Presiding Judge

Karen M. Fort Hood

Elizabeth L. Gleicher
Judges

On the Court's own motion, we REMAND this case for consideration of whether MCL 722.22(i) is constitutional as applied to the facts of this case, in light of *Obergefell v Hodges*, ___ US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015), and *Pavan v Smith*, ___ US ___; 137 S Ct 2075; 198 L Ed 2d 636 (2017). We order the parties to file supplemental briefs addressing this question in the trial court. Plaintiff-Appellant must file her supplemental brief within 28 days of the entry of this order. Defendant-Appellee must respond within 21 days of the filing of plaintiff's brief. The trial court may decide the issue presented without oral argument, but in any event, must issue an opinion within 56 days of receiving Defendant-Appellee's response.

We retain jurisdiction.

MURRAY, P.J. (*dissenting*).

There are many reasons why we Americans are so fortunate to live in this country, and to live under this Constitution. One reason that frequently stands out is our judicial system, where no matter if one is accused of a crime or is involved in a civil dispute, as in this case, parties can bring their claims to court and have them peacefully resolved. See *Early Detection Ctr v New York Life Ins Co*, 157 Mich App 618, 626-627; 403 NW2d 830 (1986). Whether through a highly-skilled attorney, or by advocating for oneself, the parties bring *their arguments* to court and allow the courts to impartially decide them. *Barnard Mfg Co Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 382-383; 775 NW2d 618 (2009) ("Under our adversarial system, each party bears the responsibility for ensuring that its positions are vigorously and properly advocated."). In other words, courts refrain from raising issues (unless involving the court's own jurisdiction to act) on their own, for courts are not advocates but objective neutrals. See *In re JEM*, 221 NC App 361, 363 n 1; 727 SE2d 398 (2012) ("An appellate court cannot be both an advocate for one of the parties, and at the same time be an impartial arbiter of the case.").

Because of these principles, since its creation our Court has developed many doctrines to remind the parties-and more importantly ourselves-that we are not in the business of raising issues for the

parties. For example, we have repeatedly said that "[t]his Court will not review *sua sponte* issues abandoned on appeal," *McGruder v Michigan Cons Gas Co*, 113 Mich App 664, 667; 318 NW2d 531 (1982), and more precisely that "[t]his Court does not generally address issues not raised by the parties on appeal." *Clohset v No Name Corp (On remand)*, 302 Mich App 550, 560; 840 NW2d 375 (2013). With respect to constitutional issues, our Court-and of course the Supreme Court-has emphasized that constitutional challenges to a statute may not be raised for the first time on appeal. See *Brookdale Cemetery Ass'n v Lewis*, 342 Mich 14, 18; 69 NW2d 176 (1955) and *Lumber Village Inc v Siegler*, 135 Mich App 685, 692; 355 NW2d 654 (1984).

Plaintiff did not raise a challenge to the constitutionality of MCL 722.22(i) in her complaint, nor did she raise the issue in any pleadings before the trial court. Indeed, her argument in the trial court and here is that a contract signed by the parties established her rights as a parent. Not surprisingly, then, the trial court did not decide any constitutional issue. In this Court, plaintiff's brief states, in the issues presented, whether the statute's definition of parent is unconstitutional. But *her* constitutional argument is that because she had a contract establishing her as a parent, her constitutional rights as a parent, recognized in *Troxel v Granville*, 530 US 57 (2000), was violated by not being able to pursue custody or parenting time. That is *not* the challenge to the statute raised by the majority. And although plaintiff did cite to *Obergefell*, it was only for the proposition that when these parties were in a relationship they were not allowed by state law to be married or to adopt. True enough, but that does not raise a constitutional challenge to a state statute on due process or equal protection grounds.

There could be a very good reason why plaintiff chose not to raise the issue raised *sua sponte* by the majority. Setting aside that her counsel could not identify where *this issue* was raised, her counsel explicitly disavowed needing *Obergefell* to be retroactive to succeed, and likewise seemed to agree with the proposition in *Lake v Putnam*, 316 Mich App 247; 894 NW2d 62 (2016), that courts are ill-equipped to re-create what could have occurred between a couple had they had the opportunity to marry while they dated. So it could well be that plaintiff chose not to raise this issue, and hedged her bet that the contract based claim to standing would prevail. But the majority has not let the parties' control their own case, and the resulting delay and cost to resolving this matter will only increase. It is wrong, and I dissent from the majority's decision to advocate on plaintiff's behalf.