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October 2024

### Board of County Com'rs of Mesa County v. Carter

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IN THE SUPREME COURT IN AND

FOR THE STATE OF COLORADO

No. 27531

BOARD OF COUNTY COMMISSIONERS )  
OF MESA COUNTY, COLORADO and )  
DOUGLAS MUTH AND THOMAS M. )  
WILKINSON, )

Petitioners, )

vs. )

HONORABLE JAMES J. CARTER, )  
Judge, Twenty-First Judicial )  
District Statute of Colorado, )

Respondent. )

BRIEF OF RESPONDENT  
IN SUPPORT OF ANSWER  
TO RULE TO SHOW CAUSE

SUBMITTED BY:

DALE G. MUFF                   7002  
MUFF & LOCKARD  
P.O. Box 2631  
Grand Junction, Colorado  
Telephone: (303) 243-5343

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## ISSUE

The issue presented before this Court in the Original Petition filed by Petitioner is:

(1) Have the Plaintiffs, Philip J. Lalena and Constance J. Lalena, in Mesa County District Court Civil Action No. 25625, failed, in a timely manner, to join as indispensable parties defendants Clymers Ranch & Livestock Co., Dudley M. Clymer, Douglas Muth and Thomas M. Wilkinson, pursuant to C.R.C.P. Rule 19 and Rule 106, and the case law decided thereunder, and, does C.R.C.P. Rule 15 apply, and if so, what is the effect of such failure?

## SUMMARY OF ARGUMENTS

I. IN A PROCEEDING CHALLENGING REZONING PURSUANT OF C.R.C.P. RULE 106 THE ONLY REQUIREMENT OF THE RULE IS THAT A PETITION BE FILED WITHIN 30 DAYS, AND THE FAILURE TO JOIN PARTIES IS NOT GROUNDS FOR DISMISSAL WITH PREJUDICE UNLESS AND UNTIL COURT FIRST REVIEWS CRITERIA SET FORTH IN C.R.C.P. 19 FOR A DETERMINATION AS TO WHETHER JOINDER IS FEASIBLE.

II. THE ORIGINAL PETITION IS DEFECTIVE IN FORM.

## ARGUMENT

I. IN A PROCEEDING CHALLENGING REZONING PURSUANT OF C.R.C.P. RULE 106 THE ONLY REQUIREMENT OF THE RULE IS THAT A PETITION BE FILED WITHIN 30 DAYS, AND THE FAILURE TO JOIN PARTIES IS NOT GROUNDS FOR DISMISSAL WITH PREJUDICE UNLESS AND UNTIL COURT FIRST REVIEWS CRITERIA SET FORTH IN C.R.C.P. 19 FOR A DETERMINATION AS TO WHETHER JOINDER IS FEASIBLE.

The court has been asked to review this same situation on numerous occasions since 1973 when the Court first reviewed in Hidden Lake Development Company v. District Court In and For the County of Adams, 183 Colo. 168, 515 P. 2nd 632 (1973) the issue and ruled that the failure to join the landowner prior to the 30 day limitation of C.R.C.P. 106 prohibited the trial court from proceeding further as the

trial court was without jurisdiction. The landowner being an indispensable party. More recent decisions dealing with similar factual situations do not re-evaluate the cases but continue to use the Hidden Lake decision as the basic case. Stating in essence that because this case is similar to Hidden Lake, our decision will be the same. Hidden Lake has served as the foundation of this series of cases and a close review of the Hidden Lake decision shows the analysis faulty. The Respondent does, however, agree that C.R.C.P. 106 is the proper rule to challenge a rezoning.

Before further discussing Hidden Lake, a brief summary of C.R.C.P. 19 is necessary. Rule 19 is the proper rule for determining whether joinder of parties is necessary. In 1970 the Colorado Supreme Court adopted a new Rule 19 which was almost identical to the Federal Rule of Civil Procedure 19. The purpose of the new rule was to set out in an affirmative matter, certain criteria or steps a court was to follow in deciding whether or not a court should proceed in the absence of a party. The Hidden Lake case cites as authority a Third Circuit Court decision Provident Tradesmens Bank & Trust Co. v. Lumbermens Mutual Casualty Co., 365 F. 2d 802 (3rd Circuit 1966) but this decision was reversed by United States Supreme Court in 1968 in the case Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). The United States Supreme Court criticizing the same approach adopted by the Colorado Supreme Court in Hidden Lake.

At 390 U.S. 117 the Court states:

The majority of the court (Court of Appeal) concluded that the Rule was inapplicable because "substantive" rights are involved, and substantive rights are not affected by the Federal Rules. Although the court did not articulate exactly what

the substantive rights are, or what law determines them, we take it to have been making the following argument: (1) there is a category of persons called "indispensable parties"; (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to participate in the lawsuit in question is also a substantive matter and is absolute.

With this we may contrast the position that is reflected in Rule 19. Whether a person is "indispensable," that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation. There is a large category, whose limits are not presently in question, of persons who, in the Rule's terminology, were called either necessary or indispensable parties. Assuming the existence of a person who should be joined if feasible, the only further question arises when joinder is not possible and the court must decide whether to dismiss or to proceed without him. To use the familiar but confusing terminology, the decision to proceed is a decision that the absent person is merely "necessary" while the decision to dismiss is a decision that he is "indispensable." The decision whether to dismiss (i.e., the decision whether the person missing is "indispensable") must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests. Rule 19 does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist. To say that a court "must" dismiss in the absence of an indispensable party and that it "cannot proceed" without him puts the matter in the wrong way around: a court does not know whether a particular person is "indispensable" until it has examined the situation to determine whether it can proceed without him.

Concluding that the absent party should be joined if feasible, the court so orders and the absent party is joined and the matter proceeds.

If joinder is not feasible then the court must determine under criteria set forth in C.R.C.P. 19(b) whether the case shall be dismissed. It is only at this point that Rule 19 mentions the word indispensable.

The court in Hidden Lake should have determined if joinder was feasible. Assuming the landowners could not have been joined, the courts next step should have been to turn to the factors contained in 19(b) of the rule to determine if they were, in fact, indispensable. It would seem possible that the court could find means to avoid or lessen any prejudice to the absent parties.

In addition, Hidden Lake cites as authority cases decided prior to the 1970 amendment to Rule 19, i.e. Hennigh v. County Commissioners, 168 Colo. 128, 450 P 2nd 73 (1969) and Woodco v. Lindahl, 152 Colo. 49, 380 P 2nd 234 (1963). These cases should not be used for the basis of a decision when, in fact, Rule 19 was subsequently amended.

While it is true that those likely to be affected are entitled to due process and as such should be brought into the process at some time it would seem that Plaintiffs have rights also and should be allowed their day in court. Rule 19 properly construed allows the joinder of parties and due process, but a continuation of the present interpretation does not permit the Plaintiffs his day in court.

## II. THE ORIGINAL PETITION IS DEFECTIVE IN FORM.

The Petition as filed with the court fails to name the Twenty-First Judicial Court as a respondent. The Supreme Court some time ago stated that in an original petition for prohibition where the court and the judge are not before the court, the Petition is defective. In the case of James v. James, 32 P 2nd 821, at page 825, the court stated:

"Two considerations seem to preclude us from granting the writ: First, necessary parties respondent, namely the court sought to be restrained and the judge thereof, are not here."



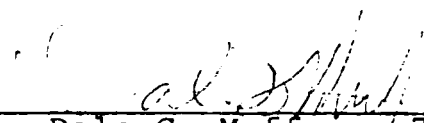
CONCLUSION

The Respondent respectfully urges the Supreme Court not to exercise its original jurisdiction in this cause, but, if it does exercise such jurisdiction, the Respondent has shown cause why the relief requested in the Petition should not be granted and requests that the Rule to Show Cause be discharged.

RESPECTFULLY SUBMITTED

MUFF & LOCKARD

By

  
\_\_\_\_\_  
Dale G. Muff 7002  
Attorney for Respondent  
P.O. Box 2631  
Grand Junction, Colorado 81501  
Telephone: 243--5343