5-22-1978

City of Colorado Springs v. District Court In and For El Paso County

IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. C-28175

CITY OF COLORADO SPRINGS, COLORADO, a municipal corporation,

Petitioner,

vs.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EL PASO, STATE OF COLORADO, and JOHN F. GALLAGHER, a Judge of said Court,

Respondents.

BRIEF IN SUPPORT OF RESPONDENTS' RESPONSE

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ARGUMENT

1. The Petition Does Not Present a Question Justifying Exercise of the Supreme Court's Original Jurisdiction

No citation is necessary, since Petitioner concedes the point, that prohibition cannot lie unless the trial court is proceeding without or in excess of its jurisdiction. Petitioner has not challenged the trial court's jurisdiction over the subject matter of the action or the persons of the defendants. Nor has Petitioner cited any authority that a statutory limitation on the amount of recovery imposes a limitation upon the court's jurisdiction. Neither does the cited statute, Section 24-10-114 C.R.S. 1973, say that the court lacks jurisdiction to enter a judgment in excess of the stated amounts; it merely says that the amounts to be recovered are so limited. In fact, Subsection (2) of the statute clearly

indicates that the court has jurisdiction to enter a judgment in excess of such amounts, by providing that there may even be recovery of a greater amount if the municipality maintains insurance coverage therefor. In short, the most that can be said for Petitioner's Petition is that it attempts to have the Supreme Court review alleged error of the trial court in entering and refusing to curtail recovery upon a judgment which the court had jurisdiction to enter; and such review could and should have been sought, if at all, upon Petitioner's appeal from the judgment as initially entered.

It is well established that a writ of prohibition will not issue merely to restrain a court from entering or enforcing a judgment or order which is reviewable on appeal. Fitzgerald v. District Court, 177 Colo. 29, 493 P. 2d 27 (1972). It may not be issued to supersede the functions of an appeal, Fitzgerald, supra, or to appeal cases "on the installment plan." Bustamente v. District Court, 138 Colo. 97, 329 P. 2d 1013 (1958).

If logic alone does not compel the conclusion that Petitioner could have raised the limitation of recovery question by appeal, the case of Jacobson v. Doan, 138 Colo. 496, 319 P. 2d 975, cited by Petitioner, should settle the matter; for in that case such question was determined on appeal and not by writ of prohibition.

2. Petitioner's Requested Relief is Barred by Failure to Appeal on the Issue of Recovery Limitation.

The judgment for $70,000, plus costs and interest, and for a mandatory injunction, was entered herein on December 10, 1974. Petitioner did not raise the issue of a limitation on the recoverability of the judgment at any time or by any means during the appeal process finally concluded by the Supreme Court's Opinion dated March 6, 1978. As Petitioner concedes in its brief herein, it was clear from the date the trial court entered its judgment, that the combined amount of the money judgment and the cost of performing the mandatory injunction would exceed $100,000. Petitioner could have raised the limitation question in its pleadings, by motion to amend or alter the judgment as soon as it was entered, in its motion for new trial, in the statement of issues on its appeal to the Colorado Court of Appeals, and in certiorari proceedings and petitions for rehearing before the Supreme Court. The raising of the issue by petition for writ of prohibition should not be countenanced at all after failure to present the issue for determination throughout over three years of the appeal process. Prohibition should not be granted where there has been an adequate remedy by appeal or writ of error, which there clearly was in this case. Shore v. District Court, 127 Colo. 487, 258 P. 2d 485 (1953).

3. The Limitation Statute Has No Application to the Cost of Performing a Mandatory Injunction.

Section 20-10-114 C.R.S. 1973 speaks entirely in terms of the amount of money which may be recovered from a municipality upon any judgment for tortious injuries. It is

elementary that an injunction, whether prohibitory or mandatory in nature, is not a money judgment or, in other words, is not a judgment for damages at law. It is a remedy granted in equity. The only relevance of the cost of performance (here stated to be approximately $44,500 at the time of trial) is to permit the court to determine the "balance of hardships" for the exercise of its equitable discretion. The injunction remedy is to prevent future, but imminent, irreparable harm, not to compensate for damage already sustained. Petitioner argues that the trial court might just as well have ordered payment to plaintiffs of the sum of money required to perform restorative work. This is not so. The mandatory injunction requires Petitioner to accomplish the work; and any payment of money to the plaintiffs in the amount estimated as the cost of the work at time of trial would be inadequate at this time, besides being beyond the power of the court to have ordered, since the question and amount of compensatory damages was solely within the province of the jury.

4. The Limitation Statute Does Not Apply to Limit the Amount Recoverable for Property Damage.

Section 24-10-103 (2) C.R.S. 1973, a part of the Governmental Immunity Act, defines "injury" to include "injury to a person" and "damage to or loss of property," thus clearly distinguishing between "injury to a person" and property damage. The statute limiting the amount of recovery on judgments against a municipality speaks solely in terms of "injury to one person" or "injury to two or more persons." It says nothing about

limiting the amount of recovery for "damage to or loss of property." As stated in Section 24-10-102 C.R.S. 1973, the Colorado Supreme Court abrogated the doctrine of sovereign immunity effective July 1, 1972, and such doctrine, therefore, is solely a creature of statute in derogation of the common law. As such, Section 24-10-114, as all other provisions of the Governmental Immunity Act, is to be strictly construed, and should not be extended beyond its express terms, which are applicable only to recoveries for personal injuries.

5. If Applicable to Property Damage Recoveries, the Limitations Statute Permits Recovery of Up to $200,000 by Two Property Owners.

Nowhere in the statute is it stated or implied, as Petitioner blandly states in its brief, that "recovery under any judgment involving injury to a single property" is limited to $100,000. Such limitation is purely a creature of overly-zealous advocacy.

What Section 24-10-114 does say is that the maximum amount recoverable for "injury to one person in any single occurrence" is $100,000; and the amount recoverable for an "injury to two...persons in any single occurrence" is $200,000. If property damage may properly be considered injury to a person or persons at all, the property damage itself must be the "single occurrence" which, in this case, has caused "injury" to "two persons," namely the plaintiffs, James F. Gladin and Faye J. Gladin, who sued as joint owners of the damaged property. Again,

the statute should be strictly construed, as being in derogation of common law. By strict construction, or simply from the common and ordinary meaning of the words of the statute, if the stature has any application at all to a mandatory injunction or to property damage, the plaintiffs should each be entitled to recover up to $100,000, or a total of $200,000, which is well in excess of the combined amount of the money judgment and cost of performing the mandatory injunction.

CONCLUSION

The Petition is patently groundless and should be rejected forthwith. However, even with such a prompt and final rejection of the Petition, its effect after nearly five years of immensely expensive litigation to establish the plaintiffs' rights against the Petitioner has been to impose yet a further burden of expense and delay upon the plaintiffs. Therefore, we urge the Court in its rejection of the Petition to assess costs and reasonable attorneys fees in the sum of $500.00 in favor of the plaintiffs and against the Petitioner.

Respectfully submitted,

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