8-16-1976

Cimarron Corp. v. Board of County Com'rs of El Paso County

IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. 27183

CIMARRON CORPORATION, a Colorado corporation for and on behalf of itself and all other similarly situated; and HOMEBUILDERS ASSOCIATION OF METROPOLITAN COLORADO SPRINGS, a Non-profit Colorado corporation, for and on behalf of the members of that association,

Plaintiff-Appellants,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EL PASO; et al,

Defendants-Appellees,

THE STATE OF COLORADO,

Intervenor-Appellee.

Appeal from the
District Court of El Paso County

Civil Action No. 73823

Honorable
WILLIAM M. CALVERT
Judge

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

ROBERT DUNLAP

228 North Cascade Avenue, Suite 307
Colorado Springs, Colorado 80903

Telephone: 475-2430
Attorney's Registration No. 2335

Attorney for Plaintiffs-Appellants

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Plaintiffs-Appellants,	)	
vs.	)	REPLY BRIEF OF PLAINTIFFS-APPELLANTS
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Defendants-Appellees,	)	
THE STATE OF COLORADO,	)	
Intervenor-Appellee.	)	

SCOPE OF THE BRIEF

This brief replies to the argument presented by the Board of County Commissioners, the School Districts and the Park and Recreation District to the effect that in four instances the challenge of the County's Subdivision Regulation must be denied for lack of standing.

THE ISSUES PRESENTED

Part B of the Plaintiffs-Appellants brief is devoted solely to the Regulation, as opposed to the statute.

Part (1) of Part B is entitled: "Are the regulations consistent with the statute?"

The County, the School Districts and the Park and Recreation District contend that the Plaintiffs-Appellants have no standing to challenge four of the alleged inconsistencies:

> (a) The Regulation's requirement that the fees be paid to the school district and Park and Recreation District - rather than the county commissioners;
>
> (b) The Regulation's provision for requiring a combination of land and fees - rather than one or the other;
>
> (d) The failure of the Regulation to restrict the use of land or fees to the provision of facilities for those who live in the subdivision from which the land or fees were taken - assuming that the statute is to be construed to contain such a restriction; and
>
> (e) The failure of the Regulation to require, as a criterion for determining whether and how much land or fees are to be taken, a consideration of existing park and school facilities - in light of the statutory condition that the power is to be exercised when "reasonably necessary".

ARGUMENT

In support of this contention the Defendants-Appellees cite:

Jackson v. City and County of Denver, 109 Colo. 196, 124 P.2d 240; City of Pueblo v. Pullaro, 130 Colo. 354, 275 P.2d 938; and 16 AJ2d, Constitutional Law, Section 119.

In Jackson, the defendant challenged a miscegenation statute. His challenge was that the statute was ambiguous in prohibiting marriage between negros, mullattos and whites in that determining race was not always possible. The defendant admitted, however, that he was unquestioncbly a negro and that his wife was unquestionably a white.

The defendant was not questioning the power of the General Assembly to enact the legislation. Rather, he was claiming that as to certain other persons, the statute might be ambiguous.

In Pullaro, the City of Pueblo had imposed a stamp tax on the purchase by consumers of cigarettes. The wholesaler was required to purchase the stamps from the City and received a discount of 8% of the face value of the stamps in exchange for affixing them to the packages. The wholesaler collected the face value from the retailer, who in turn collected the face value from the consumer.

The retailer complained that if the wholesaler were paid (in the form of a discount) for his trouble, the retailer should also be. However, the court found that as a matter of law a city may constitutionally impose the duty to collect a tax without compensating the collector for his efforts. It was from this a short step to the proposition that the defendants had "not been deprived of any constitutional right."

Jackson, is, of course, simply an illustration of the familiar principle that:

> "Because the judiciary's primary role in judicial review is to adjudicate the rights of the private parties before it, the mere fact that the constitutional rights of third parties may be in jeopardy

> provides no justification for judicial intervention". Standing to Assert Constitutional Jus Tertii, 88 Harvard L. Rev. 423, 428.

To the same effect, see Berman v. Denver, 156 Colo. 538, 400 P.2d 434, and McKinley v. Dunn, 141 Colo. 487, 349 P.2d 139.

Pullaro, on the other hand, illustrates nothing of pertinence here. It is simply a case in which, standing or no standing, the court determined the constitutional issue on the merits, and adversely to the plaintiff's challenge.

The question here, if there be one at all, is not the question decided in Jackson. That holding, that one may not assert the constitutional rights of third parties, is beside the point, and uncontroverted.

The question rather is whether the Plaintiffs-Appellants sustain sufficient damage by reason of the allegedly invalid regulation that they may complain of it.

> "Analysis of the underpinnings of Article III's injury in fact requirement has emphasized two distinct policies. First, the requirement insures that a litigant has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues' and permits effective adjudication. . . Second, the requirement is said to rest upon the reluctance of courts to exercise the extraordinary power of judicial review unless necessary for deciding a genuine controversy . . ." Standing to Assert Constitutional Jus Tertii, 88 Harvard L. Rev., supra, p. 428, n. 33.

> "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." Association of Data Processing Service Organizations, Inc. vs. Camp, 397 U.S. 150, 152; 90 S. Ct. 827, 25 L. Ed. 2d 184.

It is enough, we submit, that the challenge to unauthorized government regulation is by one who has in fact been regulated by it.

> "In keeping with out duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case, we look first to petitioners' non-constitutional claim that respondent acted in excess of powers granted him by Congress. Generally, judicial relief is available to one who has been injured by an act of a governmental official which is in excess of his express or implied powers . . ." Harmon v. Brucker, 355 U.S. 579, 581; 78 S. Ct. 433; 2 L. Ed. 2d, 503.

> "It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by the people generally. Such a claim is of that character which constitutionally permits adjudication by courts under their general powers." Stark v. Wickard, 321 U.S. 288, 304; 64 S. Ct. 559

> "It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Service Organizations, Inc. v. Camp, Supra, p. 153

The Defendants-Appellees misread the jus tertii doctrine of Jackson to require that the challengers show that had the action been constitutional, he would be "better off".

If this were required, presumably a defendant convicted of murder pursuant to a statute which denied trial by jury to male defendants would be obliged to show that he would

have been acquitted had his trial been by jury.

Or a taxpayer challenging a mill levy imposed by a ten man board of county commissioners would need to establish that his tax would have been less had the board been properly constituted of three persons.

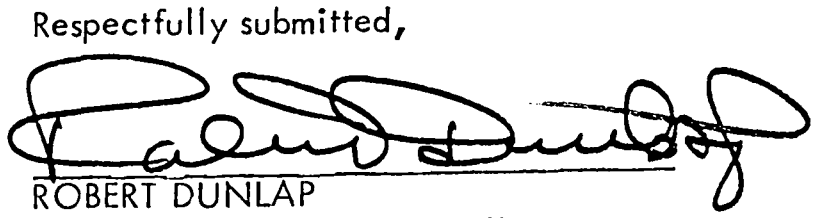
The jus tertii cases cannot be so read. The challengers in those cases are not denied a review because they have failed to show that by constitutional governmental action they would be in a better position. They are denied review simply because it is someone else, not they, who are injured.

We have searched without success for any authority in support of the broader and impossible burden which the Defendants-Appellees deduce from the jus tertii cases.

The Plaintiffs-Appellants seek review on the basis that: They are, in fact, the parties regulated by the Regulation; the Regulation requires submission to its provisions as a condition to an admittedly permissible use of property; pursuant to the Regulation land has been taken and fees have been exacted. Their challenge is, among other things, that the Regulation in several respects is not authorized by the only legitimate source of the County's power - the statute.

This, we submit, is as much interest - or standing - as is necessary.

Respectfully submitted,



ROBERT DUNLAP
Attorney for Plaintiffs-Appellants
228 North Cascade Avenue, Suite 307
Colorado Springs, Colorado 80903
Telephone: 475-2430
Attorney Registration No. 2335

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Reply Brief of Plaintiffs-Appellants, postage prepaid, addressed to:

Robert E. Anderson, Esq.
Horn, Anderson & Johnson
501 Mining Exchange Building
Colorado Springs, Colorado 80903

Clark A. Floyd, Esq.
220 Western Federal Savings Building
Colorado Springs
Colorado 80903

William R. Tiedt, Esq.
300 West Lake
Woodland Park
Colorado 80863

James L. Kurtz-Phelan, Esq.
Assistant Attorney General
104 State Capitol
Denver, Colorado 80203

on the 16th day of August, 1976, by depositing same in the United States mail at Colorado Springs, Colorado.