10-18-1976

Bushnell v. Sapp

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 27349

PAUL E. BUSHNELL,

Plaintiff-Appellant,

vs.

ARTHUR NATHANIEL SAPP and THE CITY OF COLORADO SPRINGS, a Colorado Municipality,

Defendants-Appellees.

Appeal from the District Court of the County of El Paso,
John F. Gallagher, Judge

BRIEF OF APPELLANT

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I. STATEMENT OF ISSUES FOR REVIEW

The Court is being asked to rule upon the following:

A. Is the abolishment of Tort liability in the "Colorado Auto Accident Repirations Act" (No-Fault) unconstitutional.

B. Is the Colorado Threshold Requirement of the No-Fault Act unconstitutional.

C. Do tort-feasors who are not required to be covered by the No-Fault Act have a statutory option to come under the Act, and if they do have an option, is it unconstitutional.

II. STATEMENT OF THE CASE

Plaintiff filed a personal injury action against an individual police officer and the City of Colorado Springs alleging that he had sustained personal injuries as a result of the negligent, careless or reckless driving of the police officer.

Plaintiff alleged that at the time of the collision, he was thrown from his bicycle and received physical injuries to his body and mind, and was impaired and disabled as a result of the collision.

Defendants filed a Motion to Dismiss and Brief and Support Thereof essentially stating that the Defendant came under No-Fault and that the Plaintiff had not attained any of the thresholds allowing him to sue.

Plaintiff responded to the Motion to Dismiss (assuming that it would be treated as the summary judgment) and admitted failure of threshold attainment.

Plaintiff also asserted that the Defendant did not come under No-Fault, by interpretation of the statute and, furthermore, if the Defendants were found to be covered by No-Fault, such interpretation was unconstitutional.

After hearing, the District Court in an Order dated June 22, 1976, granted the Defendants' Motion and dismissed the Complaint.

Plaintiff appeals that Order and requests that the Complaint be reinstated.

III. ARGUMENT

A. Summary

1. The Defendants are not specifically covered under No-Fault and can only be brought under No-Fault by interpreting C.R.S. 10-4-715 (1973) to make coverage and protection of the No-Fault Act optional on the part of these Defendants. Such an interpretation would be unconstitutional on several grounds. It would constitute an unlawful delegation of legislative authority and would constitute a form of special legislation. Further it would be in derrogation of the due process and equal protection clauses of the Colorado and U.S. Constitutions.

2. The threshold requirements of the Colorado No-Fault Act are unconstitutional in that they are arbitrary and bear no reasonable relationship to the Subject (various damages sustained) and therefore deny due process and equal protection.

3. The No-Fault Act itself, insofar as it eliminates actions for damages for bodily injury caused by a motor vehicle should be ruled unconstitutional because it violates the equal protection clause of the Colorado Constitution by not affording a remedy to "every injury to person".

1. Under Colorado No-Fault, C.R.S. 10-4-714 (1973), (Limitation of Actions) Tort actions are abolished only if No-Fault coverage is required under C.R.S. 10-4-705 (1973). The latter states that coverage is required by every owner of a "motor vehicle". C.R.S. 10-4-703 (7) (1973) defines "motor vehicle" as any vehicle required to be registered and licensed under the laws of Colorado. C.R.S. 42-3-103 (3) (1973) entitled Exemption, states that registration shall not be required for "police patrol wagons". In the case at issue, it is alleged that Defendants' vehicle was a police patrol wagon and was therefore not required to be registered and licensed. Thus, the Defendants were not required to have No-Fault coverage, and the limitation on Tort actions found in C.R.S. 10-4-714 (1973), does not apply to the Plaintiff.

The trial Court brought the Defendants under the No-Fault Act by interpreting C.R.S. 10-4-715 (1973) to mean that a non-covered person has the option of protection under No-Fault by purchasing insurance. This section generally sets forth situations when the limitation on Tort action does not apply. To bring section 715 into effect on the present case required judicial interpretation.

It is submitted that such interpretation, i.e. allowing a potential tort-feasor to determine whether or not he will afford himself of the protection of the No-Fault Act, is an unlawful delegation of legislative authority to that individual in violation of Article 3 of the Colorado Constitution. This Court and Olin Mathieson Chem. Corp. v. Francis, 134 Colorado 160, 301 P2d 139 (1956) held that the Colorado Fair Trade Act was unconstitutional partially because it was special legislation. The Court stated at page 152

> "it becomes operative only to those who elect and attempt to bind non-contracting retailers dealing in the same commodities. What today may be invalid as a restraint of trade may under our act that the whim of the manufacturor be perfectly lawful the next week".

Likewise, in the instant case, a person not under the act ought not be able to bring himself within and out of its provisions at his own whim - by electing insurance coverage or cancelling the same or indeed, if he is able to afford insurance or not.

It is further submitted that the exclusions of coverage under No-Fault found in C.R.S. 42-3-103 (3) (1973) is a violation of equal protection and of due process. It may have been convenient for the legislative draftsman, but it does not set up to rational classes. For instance, all firefighting vehicles are excluded from No-Fault coverage when, on the other hand, police ambulances are excluded and

non-police ambulances are not excluded. The intricate formula for determining whether or not self propelled construction equipment comes under the act bears absolutely no relationship to the purposes of No-Fault. The arbitrary inclusion or exclusion is a denial of due process under the Colorado and Federal Constitution. See Game and Fish Comm'n v. Farmers Irrigation Co. 162 Colo. 301, 426 P2d 560 - 562 (1967).

2. The threshold requirements of the Colorado No-Fault Act are unconstitutional in that they are arbitrary and bear no reasonable relationship to the subject. Therefore they deny due process and equal protection.

C.R.S. 10-4-714 (1973) sets forth thresholds, one of which must be attained before one can maintain an action in bodily injury.

Death

Dismemberment

Permanent Disability

Permanent Disfigurement

Hospital and Medical Services of the reasonable value of at least $500.00 (the average cost to be determined by the commissioner of insurance and published not less than once each year)

Loss of Earnings and Earning Capacity beyond 52 weeks unless compensated by insurance.

The threshold does not have to bear any relationship to the specific element of damage recoferable or to the value.

For instance, take two hypothetically injured people, one suffers a severe broken arm and the other a severe sprain to the knee producing severe pain which will be symptomatic for a number of years. In the first example the person would be able to recover for the arm as well as the pain and suffering of the knee. The pain and suffering accompanying the knee may have a value far greater than the broken arm, but the person who receives only the damaged knee cannot recover. We do not have the case in Colorado where the legislature says that before you can recover anything you have to attain the threshold even though that threshold has relatively little value to the total damages.

It is a denial of equal protection and due process to arbitrarily classify those who may maintain a tort action as opposed to those who may not maintain a tort action upon an event that may have little or nothing to do with the tort action itself.

3. The No-Fault Act itself insofar at it eliminates personal injury claims for relief, should be ruled unconstitutional because it violates the equal protection clause of the Colorado Constitution by not affording a remedy to "every injury to person" as set forth in the equal protection clause of the Colorado Constitution.

Article II, Section 6 of the Constitution of the State of Colorado provides:

> "That Courts of Justice shall be open to every person and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay." (Emphasis supplied)

This has been generally interpreted in Colorado as a prohibition against the judiciary and not the legislative branches of government. See Vogts v. Guerrette, 142, Colo. 527, 351 P2d 851 and Noakes v. Gaiser, 136, Colo. 73, 315, P2d 183 (1957). It is submitted that this line of cases should be reversed for the reasons brilliantly set forth in the dissenting opinion by Mr. Justice Frantz in Noakes v. Gaiser at page 185.

> * * * The court may not avoid its responsibility by closing its eyes to a patent legislative effort to whittle away what is plainly required of it by the Constitution. Such divestiture of constitutional authority should be scuttled by the court without delay; it should maintain the pristine integrity and vitality of the judicial branch of govenment as contemplated and fixed by the founding fathers.
>
> The quoted section of the Constitution embraces the principle of natural justice: that in a Republican form of government every man should have an adequate legal remedy for an injurious wrong done to him by another. This constitutional provision is a command to the courts to be open to every person and to afford such person a remedy for injury to him by another, and that such rights shall not be denied. A statute contravenes this constitutional provision which would render the court impotent to act where the injunction of the constitutional provisions requires that it do act. Where such is manifest, the court ought to declare the invalidity of the law without hesitation, upon its own motion.

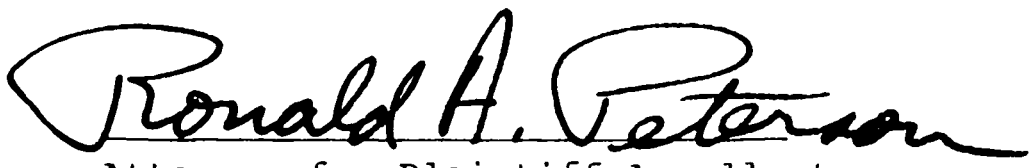
> One of the most highly regarded rights conferred upon the individual by Magna Charta is the provision that "we will sell to no man, we will not deny to any man, either justice or right." This provision of Magna Charta finds its counterpart in Article II, Sec. 6 of the Constitution of this state and in similar constitutional provisions in a number of other states. The courts of the several states having like provisions have held that its intent and purpose is "to preserve the common law right of action for injury to person or property, and while the legislature may change the remedy or form of procedure, attach conditions precedent to its exercise, and perhaps abolish old and substitute new remedies * * *, it cannot deny a remedy entirely."
>
> * * * In other words, the effect of the constitutional provision is this, that frozen into our law are those rights to recovery for injury to person, property or character which existed at the time of the adoption of our Constitution.

When our Court first chose to determine that the equal rights provision was a constraint only upon the judiciary it had to go beyond the plain reading of the Constitution to do so. The Constitution does not say that a remedy shall be afforded for every injury to person as such injury is defined by the legislature. The Constitution states that a remedy shall be afforded for every person. If the legislature does away with the remedy the injured person has none. The reasoning in the Olin Mathieson Chem. Corp. v. Francis, Supra at page 147, is sound. "The police power of the state exercisable by the general assembly, while very broad, is exercisable only within the limits of the Constitution."

IV. CONCLUSION

Appellant requests this Court to reverse the Trial Court's judgment for the Defendants and order the Complaint reinstated.

Respectfully submitted this 18th day of October, 1976.



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VERIFICATION OF MAILING

I declare that I am over the age of eighteen years and not a party to the above action, that my business address is Suite C, 524 South Cascade Avenue, Colorado Springs, Colorado; that I have served a copy of the attached Appeal of Appellant upon the Defendant-Appellees, through their attorneys of record, whose address is:

Kane, Donley and Wills
301 South Weber
Colorado Springs, Colorado 80903

and the Attorney General of the State of Colorado whose address is:

Attorney General
State Capitol Building
Denver, Colorado 80202

by placing a true copy of the same in the United States mail, postage prepaid, at Colorado Springs, Colorado.

Executed this 18th day of October, 1976.

Dana Dieffenderfer