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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

E.C. Burnett, III and Roger Couch, Circuit Court Judges

2009-146906
Case No. 2007-CP-42-09988R
APPELLATE CASE NO. 2012-212473

Carolina Convenience Stores,
Inc., Harry Lancaster Jr., as
Power of Attorney for Harry
Lancaster Sr., and Willard Oil
Company, Inc,

Petitioners,

v.

City of Spartanburg, SC

Respondent.

REPLY BRIEF OF PETITIONER

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Dated: 4/14, 2014
Spartanburg, South Carolina

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(A) **ARGUMENTS**

(A)(1) **Introduction**

Respondent admits in its brief on page 32 that the police destroyed the property of Petitioners to “protect the public safety and welfare.” Petitioners are seeking only to have the public pay its fair share and not be forced to bear alone the cost which, in all fairness and justice, should be borne by the public as a whole. This requires an ad hoc inquiry and the application of the Penn Central balancing test by the lower court.

Respondent’s brief cites state court cases from the 1800’s and even cites to “Legend” as support for its arguments but never once cites any provision of the South Carolina or U.S. Constitutions requiring Petitioners’ alone to bear the costs when their business is destroyed for the public at large. The reason is private property means something in South Carolina and in the United States and at the very least the property owner is entitled to a hearing on the matter balancing at least the following factors: “the economic impact of the regulation on the claimant” and “the extent to which the regulation has interfered with distinct investment-backed expectations.”¹ This inquiry was not completed and therefore summary judgment was not appropriate.

(A)(2) Respondent Ignores the Protections Outlined in U.S. Supreme Court Cases and their Application to Facts Similar to those Currently Before this Court

Respondent makes no effort to argue against the 5th Amendment protections to individual citizens but instead seeks to exclude entirely the decision and analysis of Penn Central. This is so because, regardless of the circumstances, the Fifth Amendment “bar[s] Government from forcing some people alone to bear public burdens which, in all

¹ Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

fairness and justice, should be borne by the public as a whole.”² Of course this depends on the facts of each case and thus the need for a balancing test. Respondent offers no such test in response. This ignores significant Supreme Court jurisprudence recognizing that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government.”³ Respondent’s repeating the words “there was no taking”; “there was no public use”; there was no physical appropriation” does not make it so. The majority of states recognize that these issues are not easily resolved by just saying the words but rather that there must be some type of balancing test as is outlined in Penn Central.

This is true even of some of the cases cited by Respondent. Take the Kelley v. Story case for example.⁴ Respondent cites to Kelley in a manner that suggests that case held there could never be an inverse condemnation action when the police damaged a residence.⁵ Just the opposite is true as in that case the Court adopted the Penn Central balancing test Petitioners contend is applicable here.⁶ Yet Respondent persists in its refusal to acknowledge the applicability and necessity of the test to this set of facts preferring instead to cite to “Legend.”⁷ Accordingly, the only balancing test before the Court is what Petitioners have offered under Penn Central and the matter should be remanded with instructions to the lower court to administer this test in the case at bar.

² Penn Central, 438 U.S. at 123.

³ Id. at 124 (citing U.S. v. Causby, 328 U.S. 256 (1946)).

⁴ See, Kelley v. Story County Sheriff, 611 N.W.2d 475 (Iowa 2000).

⁵ Respondent’s brief, p. 20 and 29.

⁶ Kelley, 611 N.W.2d at 480.

⁷ Respondent’s Brief, p. 30, fn. 2.

(A)(3) Respondent Seeks to Rewrite History Regarding the Purpose for Destroying the Petitioner's Business

Respondent states over and over again how its purpose in destroying the building was to save the hostage and that it acted with nearly no time. This is contrary to the testimony of the officers on the scene. The truth is the officers were out there for hours and hours prior to destroying the building and eventually made the call to end the standoff regardless of the consequences.⁸ They have even admitted that they accepted responsibility and liability for taking this action.⁹ Given this truth, it is at least confusing the facts for Respondent to repeatedly cite the only purpose for destroying the building was saving the life of the hostage.

(A)(4) Miscellaneous Arguments

Respondent has argued that law enforcement should not have to consider private property rights as that might deter swift action. Law enforcement always must and indeed does consider such rights otherwise the Bill of Rights ultimately becomes meaningless. The power of the police must be limited and the proper method for doing that is the balancing test of Penn Central: an analysis of the character of the governmental action, economic impact on the Plaintiff, and the extent to which investment-backed expectations are affected.

Under this analysis not every minor damage will require compensation as Respondent's doomsday projections suggest. Indeed, most damage will probably not meet the investment-backed expectation element. But where, as here, an entire business is lost there must at least be a balancing test; some means to protect the rights of property owners in South Carolina.

⁸ Deposition of Major Horton, R. pages 188, line 12 to p. 189, line 8.

⁹ Id. at R. p. 189, lines 1-3.

B. CONCLUSION

The City of Spartanburg has paid no compensation to Petitioners for the deliberate destruction of their property and business for the admitted purpose of public welfare. Even assuming the City of Spartanburg exercised “police power” authority, it cannot exercise this authority in violation of the U.S. and South Carolina Constitutions, which prevent the state from requiring a small group to bear more than their just share of the burdens of government. What constitutes this just share must be determined by applying the factors of Penn Central at an ad-hoc inquiry conducted by the lower court. Because this inquiry was not conducted, summary judgment was improper.

Respectfully Submitted by:

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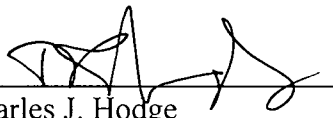
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CERTIFICATE OF COMPLIANCE FOR PETITIONER'S REPLY

This will certify that Petitioner's brief is in compliance with Rule 211 SCACR.



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CERTIFICATE OF SERVICE

This will certify that Petitioner's Reply Brief in the above-captioned matter was served upon all counsel of record by mailing these documents the 14th day of April addressed as follows:

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