Trials: Litigant Lacks Standing If It Cannot Not Obtain Desired Relief Under Any Interpretation of Applicable Ordinances

KH Outdoor, LLC v. Fulton County, No. 13-14663 (11th Cir. Oct. 1, 2014).

After evaluating a convoluted series of intertwined lower court actions, the Eleventh Circuit has determined that a plaintiff billboard company must establish standing to proceed, where it appears that the plaintiff's First Amendment claims would not succeed under any interpretation of applicable county sign ordinances.

In 2003 KH Outdoor, LLC filed applications with Fulton County, Georgia to erect outdoor billboards. The applications were rejected under the County's sign regulations. KH sued, arguing the regulations were unconstitutional and violated its First Amendment rights.

Meanwhile another billboard case against the County was wending its way through the Georgia state court system - *Fulton County v. Galberaith*, 647 S.E.2d 24 (Ga. 2007) - and ultimately ended in the Georgia Supreme Court. In *Galberaith*, the state's high court held that portions of the County sign ordinance relevant to the KH Outdoor case were unconstitutional. The *KH Outdoor* court took note, but sided with the County on the basis that the KH billboard applications would have been rejected based on other portions of the County code. In fact the court held KH lacked standing because those remaining portions of the County code after *Galberaith* prohibited the billboards.

KH appealed and the Eleventh Circuit vacated because yet another billboard case - *Fulton County v. Action Outdoor Advertising*, JV, LLC, 711 S.E.2d 682 (Ga. 2011) – had also gone up to the state supreme court. This case clarified that *Galberaith* had completely struck down the Fulton County sign ordinance in its entirely, leading the Eleventh Circuit to vacate the District Court's standing holding and remand for reconsideration.

The District Court set a trial date for the sole remaining issue of damages. The County, however, argued it should be able to amend its answer in the case because, as it turns out and apparently unknown to the federal district court hearing the case, KH Outdoor and Fulton County had been involved in an *entirely separate litigation* in the state courts since 2006. This case involved a second set of KH billboard applications denied by the County in 2006. And this second case had been consolidated in the 2011 *Action Outdoor Advertising* case in the Georgia Supreme Court. As a result, the County argued KH's federal case was now barred by *res judicata.* KH, using the same prior holding, countered that the court should bar any evidence or argument regarding its standing since that issue had been heard and decided by the state high court. The District Court denied the county's *res judicata* claim and granted KH's motion and the case went to trial. The jury awarded nearly $4 million in damages to KH. The County again appealed.

HELD: The Eleventh Circuit vacated the District Court's order denying the County's motion for judgment as a matter of law and remanded to determine standing.

DISCUSSION: The County argued that the District Court improperly assumed the standing issues in its case were identical to those litigated by the parties in *Action Outdoor Advertising*. The County pointed out the *Action Outdoor Advertising* case involved County regulations from

2006, while the current case involved County regulations from 2003. The majority agreed, holding the District Court erred by barring the County's evidence regarding the different regulations. The Circuit Court found it noteworthy that the County was prepared with testimony from at least two parties regarding the difference in the regulations, while KH had no evidence to present at all to rebut this testimony.

In supporting its theory that standing was a threshold issue in the case, the majority cited two recent Eleventh Circuit cases as precedent. It argued the dissent would wrongly have had the court discount its own binding precedent in favor of an older Supreme Court case, *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). The majority argued this was an inapposite precedent, however, because the rules of *Mt. Healthy* only "enters the analysis once a plaintiff is shown to have standing," which the majority thought the District Court had yet failed to determine. It remanded on the standing issue.

http://media.ca11.uscourts.gov/opinions/unpub/files/201314663.pdf (last accessed Oct. 9, 2014).