

JEFFERSON COUNTY DISTRICT COURT 100 Jefferson County Parkway Golden, Colorado 80401	DATE FILED: February 18, 2014 2:51 PM CASE NUMBER: 2013 CV 2550 Case No.: 12 CV 2550 Div.: 5 Courtroom: 4e
In re the Lower North Fork Fire litigation	
ORDER re: Governor and Attorney General Constitutionality of sec. 24-10-114(1), C.R.S.	

The present Order addresses whether the Governor and Attorney General are properly named as parties to this action, and whether sec. 24-10-114(1), C.R.S., the so-called “tort cap” statute, is violative of the Colorado or United States Constitutions.

1. Present controversy

The events which resulted in the Lower North Fork Fire have been reviewed by the parties on many occasions. The court sees no need to review these events again

(a) parties

In the present posture of this litigation, the parties may generally be grouped into homeowners and insurance companies, on one side of the case, and various governmental agencies and their agents or employees, on the other.

The formal names of the parties involved in this litigation are difficult to understand.¹ To simplify the present Order, and without prejudice to any party, the court usually refers to the homeowner and insurance company parties as simply “homeowners” or “claiming parties.” The court usually refers to the governmental entities or employees who are opposing the homeowners as “defending parties.”

(b) present controversy

Several of the homeowners have argued that the so-called “tort cap,” which limits the damages which may be recovered by a tort plaintiff in a lawsuit brought against the state, is unconstitutional. The cap is found in sec. 24-10-114(1), C.R.S.

For the purposes of making their constitutional challenge, these homeowners have named the Governor and Attorney General as defendants in this action. The Governor and Attorney General object to their inclusion in the present litigation, and ask the court to dismiss the claims against them pursuant to Rule 12(b)(5), C.R.C.P.

Because of the large number of parties involved in the present litigation, and the volume of pleadings filed by these parties, the court finds that directing the present Order to

¹ Most of the homeowners, for example, are technically Respondents in Interpleader.

particular arguments advanced by particular parties is neither necessary nor desirable. The court accordingly addresses the present Order to all of the parties who have advanced claims against the Governor and Attorney General, and who have challenged the constitutionality of the tort cap.

2. Applicable law - Rule 12(b)(5)

The Governor and Attorney General ask the court to dismiss the claims against them pursuant to Rule 12(b)(5), C.R.C.P.

In ruling upon Rule 12(b)(5) motions, the court must accept the factual allegations of the complaint as true, and must view the allegations in the light most favorable to the non-moving party. Denver Post Corp. v. Ritter, 255 P.3d 1083, 1088 (Colo. 2011). The court is not to accept as true legal conclusions which the complaint miscasts as factual allegations. Denver Post, *supra* at 1088; Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo. App. 2008).

Viewing the complaint in the manner stated in the preceding paragraph, the court is to test the legal sufficiency of a party's claims by asking whether "it appears beyond a doubt that a plaintiff can prove no set of facts in support of her claim which would entitle her to relief." Cherokee Metropolitan Dist. v. Upper Black Squirrel, etc., 247 P.3d 567, 573 (Colo. 2011); *see a/so* Dorman v. Petrol Aspen, Inc. 914 P.2d 909, 911 (Colo.1996).

3. Analysis

The homeowners do not seek affirmative relief against the Governor or Attorney General. The gist of their claim is that (i) the tort cap is unconstitutional; and (ii) it is the obligation of the Governor and Attorney General to either defend the cap, or to admit that the cap is violative of the state or federal constitutions.

The manner in which the Rule 12(b)(5) standard is to be applied to claims such as these is not immediately apparent to the court. To the extent that the analysis required by this Rule is applicable to the present circumstances, the court applies it as follows.

(a) constitutional challenges - general rule

The court first notes that any citizen against whom an enactment of government is sought to be enforced may challenge the enactment on grounds that it is violative of the state or federal constitutions. The party making the constitutional challenge bears the burden of proving his claim of unconstitutionality, and must prove his claim beyond a reasonable doubt.

The burden of defending the constitutionality of a challenged enactment is usually the responsibility of the party who seeks to enforce the enactment, or who seeks recovery or sanctions in reliance upon it. In a criminal prosecution, for example, it falls to the district attorney to defend the constitutionality of a statute under which he seeks to prosecute an offender.

In the present matter, the governmental agencies relying upon the tort cap are those associated with the Forest Service. At first blush, therefore, it would seem that the

Governor and Attorney General have no dog in this fight and, for that reason, are not in a position to afford relief to the homeowners who have sued them. In the language of Rule 12(b)(5), C.R.C.P., it would appear that the homeowners have failed to state a claim against the Governor and Attorney General upon which relief can be granted.

(b) constitutional challenges - exception

There is an exception to the above-referenced “no dog in the fight” rule. The exception is described in Developmental Pathways v. Ritter, 178 P.3d 524 (Colo. 2008), and is as follows:

Under article IV, section 2 of the Colorado Constitution “[t]he supreme executive power of the state shall be vested in the Governor, who shall take care that the laws be faithfully executed.” Colorado has long recognized the practice of naming the Governor, in his role as the state's chief executive, as the proper defendant in cases where a party seeks to “enjoin or mandate enforcement of a statute, regulation, ordinance, or policy.”

178 P.3d at 529 (citation omitted; emphasis added).

The above-quoted passage of Developmental Pathways retreats somewhat from the broad language of Ainscough v. Owens, 90 P.3d 851 (Colo. 2004), which is relied upon by the homeowners in the present litigation. The holding of Developmental Pathways, it seems to this court, is that the Governor or Attorney General are properly named as defendants in litigation concerning the constitutionality of an enactment only if there is no other party available to defend the enactment. See Developmental Pathways, *supra* at 530 (“There was no alternative entity for Plaintiffs to sue in order to challenge Amendment 41.”).

In the present litigation, there are parties available to defend the constitutionality of the tort cap: namely, the governmental agencies which are seeking to use the cap to limit the homeowners’ recovery. These agencies (which, by statute, are represented by the Attorney General) are obviously capable of litigating the constitutionality of the cap, and, since their interests are aligned with the interests of the State, will no doubt defend the cap with the zeal required by the Rules.²

(c) conclusion

Applying Developmental Pathways, *supra*, the court cannot find that the present litigation presents the narrow circumstance in which the Governor and Attorney General may be properly named as parties to an action challenging the constitutionality of an enactment. See *also* Romer v. Evans, 854 P.2d 1270 (Colo. 1993).

² The court makes this observation because, pursuant to Rule 57(j), C.R.C.P., parties challenging the constitutionality of an enactment are required to give notice of their challenge to the Attorney General, who, in the words of the Rule, “is entitled to be heard.” A similar Rule applies in appellate matters. See Rule 44(a), C.A.R.

The purpose of the above-cited Rules is to permit the Attorney General to participate in constitutional challenges arising in litigation between private litigants when, in his judgment, the parties themselves may not adequately protect the interests of the State. This is obviously not the circumstance now before the court.

4. Constitutionality of tort cap

The homeowners named the Governor and Attorney General as defendants in this action for the purpose of challenging the constitutionality of the tort cap. As stated above, the cap is contained in sec. 24-10-114(1), C.R.S.

The court declines to analyze the homeowners' arguments concerning the constitutionality of sec. 24-10-114(1) because this court is bound by the Supreme Court's decision in Colorado State Claims Board, etc. v. DeFoor, 824 P.2d 783 (Colo. 1992). The DeFoor decision upheld the constitutionality of sec. 24-10-114(1) in circumstances which, as a legal matter, are indistinguishable from the circumstances now before the court.

It seems to the court that the arguments advanced by the homeowners are directed to the wisdom of the CGIA tort cap. The wisdom of sec. 24-10-114(1) (or, for that matter, of any other statute) is not a matter for this court, or for the Supreme Court. Policy issues concerning sovereign immunity (which is the conceptual basis for the cap) are matters for the legislature. Evans v. Board of County Commissioners, etc., 482 P.2d 968 (Colo. 1971).

5. Conclusion and Order

The homeowners have failed to state a claim against the Governor or Attorney General upon which relief can be granted. The motions of the Governor and Attorney General to dismiss all of the claims against them pursuant to Rule 12(b)(5), C.R.C.P. are accordingly GRANTED.

The motions of the homeowners asking the court to find sec. 24-10-114(1) to be unconstitutional are DENIED.

Date: February 18, 2014



Judge