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Opinion No. 12-44

Tennessee Constitution's Open Courts Clause

QUESTIONS

1. Does House Bill 3619/Senate Bill 3461, 107th General Assembly, 2nd Sess. (2012) (hereinafter "HB3619") violate the Open Courts Clause of the Tennessee Constitution?

2. Does HB3619 violate the Equal Protection Clause of the Tennessee Constitution?

OPINIONS

1. HB3619's requirement that litigants pay a substantial mandatory pre-trial surety bond or have their action dismissed is constitutionally suspect under Tennessee's Open Courts Clause.

2. The answer to this question is pretermitted by the response to Question 1.

ANALYSIS

HB3619 "intends to encourage the location of equine slaughter and processing in facilities in Tennessee that meet all sanitary, safety and humane slaughter requirements established by state or federal law or regulation." HB3619, Amend. 1, §1. The questions posed seek guidance on whether the process for challenging licensure of these facilities set forth in HB3619 is constitutionally suspect.

HB3619 establishes the following requirements for any party seeking to challenge licensure in a court proceeding:

> (a) (1) If an action is filed in circuit or chancery court to challenge the issuance of a license or permit for an equine slaughter or processing facility, the court shall require a surety bond of the person filing the action. The bond shall be set at an amount representing twenty percent (20%) of the estimated cost of building the facility or the operational costs of an existing facility.
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> (2) The bonding requirements of this subsection shall not apply to an indigent person.

> (b) If the bond required under subsection (a) is not paid within thirty (30) days of the filing of the action, the action shall be dismissed.

Id. at §1(a) & (b).

1. The initial question is whether the posting of this type of surety bond violates the Open Courts Clause of the Tennessee Constitution, which provides "[t]hat all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Tenn. Const. art. 1, § 17.

Tennessee's Open Courts Clause was designed "to ensure that all persons would have access to justice through the courts." William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Consideration of Article I, Section 17 of the Tennessee Constitution,* 27 U. Mem. L. Rev. 333, 341 (1997). This type clause exists in various forms in thirty-eight states, including Tennessee. *Id.* Although this clause does not explicitly appear in the United States Constitution (*id.*), the concept of open access to courts is implicit in several provisions of the federal Constitution and has long been recognized in federal jurisprudence. As the Sixth Circuit Court of Appeals succinctly explained:

> "It is beyond dispute that the right of access to the courts is a fundamental right protected by the Constitution." *Graham v. National Collegiate Athletic Ass'n,* 804 F.2d 953, 959 (6th Cir.1986). In fact, the right of access to the courts finds support in several provisions of the Constitution including: the Due Process Clause of the Fourteenth Amendment, *Wolff v. McDonnell,* 418 U.S. 539, 579, 94 S.Ct. 2963, 2986, 41 L.Ed.2d 935 (1974), the Equal Protection Clause, *Pennsylvania v. Finley,* 481 U.S. 551, 557, 107 S.Ct. 1990, 1994, 95 L.Ed.2d 539 (1987), the First Amendment, *Turner v. Safley,* 482 U.S. 78, 84, 107 S.Ct. 2254, 2259, 96 L.Ed.2d 64 (1987) (citing *Johnson v. Avery,* 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969)), and the Privileges and Immunities Clause of Article IV, *see, e.g., Chambers v. Baltimore & Ohio R.R. Co.,* 207 U.S. 142, 148, 28 S.Ct. 34, 35, 52 L.Ed. 143 (1907); *Smith v. Maschner,* 899 F.2d 940, 947 (10th Cir. 1990).
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> The right of access in its most formal manifestation protects a person's right to physically access the court system. Without more, however, such an important right would ring hollow in the halls of justice. *See Chambers*, 207 U.S. at 148, 28 S.Ct. at 35 ("In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship...."). Access to courts does not only protect one's right to physically enter the courthouse halls, but also insures that the access to courts will be "adequate, effective and meaningful." *Bounds v. Smith,* 430 U.S. 817, 822, 97 S.Ct. 1491, 1495, 52 L.Ed.2d 72 (1977).

Swekel v. City of River Rouge, 119 F.3d 1259, 1261-62 (6th Cir. 1997), *cert. denied sub nom. Swekel v. Harrington,* 522 U.S. 1047 (1998).

An early Tennessee case recognized that excessive security requirements could violate Tennessee's Open Courts Clause. *Jones v. Kearns,* 8 Tenn. (Mart. & Yer.) 241, 247 (1827) (Supreme Court concluding that Open Courts Clause prohibited clerks of the courts from requiring any additional security for costs once the security required by statute had been provided). Since that date, courts in other jurisdictions have found that similar constitutional provisions requiring open access to the courts prohibit impeding such access through unreasonable financial barriers. As the Oklahoma Supreme Court explained in summarizing these various court cases:

> The recurring element in these cases is that fees or costs that are not deemed to be for court-related purposes are violative of the open access to the courts guarantee. The upshot is that such fees, whatever they are called, impose an unreasonable burden on litigants. *Cf. Crocker v. Finley,* 99 Ill. 2d 4444, 77 Ill. Dec. 97, 459 N.E.2d 1346 (1984). A connection between filing fees imposed and the services rendered by the courts or for maintenance of the courts is required.

Fent v. State ex rel. Dept. of Human Services, 2010 OK 2, ¶ 16, 236 P.3d 61, 68 (2010). *See also Trinity River Authority v. URS Consultants, Inc.,* 889 S.W.2d 259, 261 (Tex. 1994).

For example, Florida courts have determined that Florida's Open Courts Clause.[1] restricts the creation of financial barriers to court access. *See G.B.B. Investments, Inc. v. Hinterkopf*, 343 So.2d 899, 901 (Fla. 3d DCA 1977) (holding that the constitutional right of access to the courts sharply restricts the imposition of financial barriers to asserting claims and defenses in court). In *Psychiatric Associates v. Siegel*, the Florida Supreme Court held that statutes requiring persons to post bond sufficient to cover costs and attorney fees before their action can be prosecuted violates their constitutional right of access to courts. *Psychiatric Associates v. Siegel*, 610 So.2d 419, 425 (Fla. 1992).

The Supreme Court of New Hampshire considered whether a statute that required a party to pay fees to the probate court to hold a special session and render a judicial determination violated New Hampshire's Open Courts Clause.[2] The Court, relying upon the guarantee that "every subject of this state is entitled…to obtain right and justice freely, without being obliged to purchase it," determined that New Hampshire's Open Courts Clause "forbid[s] the payment of a fee to a judge in consideration of his holding a special session and rendering a judicial decision for a party." *In re Estate of Dionne*, 518 A.2d 178, 179-180 (N.H. 1986) (citing *Christy & Tessier v. Witte*, 495 A.2d 1291 (1985)).

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[1] FL Const. art. I, § 21 provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

[2] N.H. Const. pt 1, art. 14 provides that "[e]very subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

Similarly, although Illinois recognizes that the Open Courts Clause of the Illinois Constitution[3] does not guarantee to the citizen the right to litigate without expense, the Clause does protects a citizen "from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy in the law or impede the due administration of justice." *Ali v. Danaher*, 265 N.E.2d 103, 106 (1970) (quoting *Williams v. Gottschalk*, 83 N.E. 141, 142 (1907); *Adams v. Corriston*, 7 Minn. 456, 461 (1862)).

Finally, Texas has perhaps the most similar Open Courts Clause to Tennessee's and has developed a wealth of authority addressing the impropriety of financial barriers to court access. Texas's Open Courts Clause states that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." Tex. Const. art I, § 13. In interpreting this provision, the Texas Supreme Court has on several occasions invalidated fee or surety requirements on the grounds such requirements unreasonably interfered with an individual's access to courts. *See R. Communications, Inc. v. Sharp,* 875 S.W.2d 314, 317-18 (Tex. 1994) (holding that a statute precluding injunctive relief when challenging a sales tax assessment unless the challenging party paid the assessed taxes or posted a bond equal to double the estimated tax liability was unconstitutional); *State v. Flag-Redfern Oil Co.,* 852 S.W.2d 480, 485-86 (Tex. 1993) (finding that a regulation requiring payment of a deficiency assessment within thirty days of seeking judicial review of the assessment violated the Open Courts Clause); *Texas Association of Business v. Texas Air Control Board,* 852 S.W.2d 440, 450 (Tex. 1993) (holding unconstitutional an environmental regulatory statute authorizing the assessment of fines prior to judicial review and requiring a supersedeas bond in the amount of the fines assessed as a prerequisite to judicial review).

The application of these principles to the question presented leads to the conclusion that the process proposed by HB3619 to contest the licensure of equine slaughter facilities would likely be held unconstitutional under Tennessee's Open Courts Clause. The constitutional guarantee of access to courts forecloses unreasonable and arbitrary barriers to a citizen utilizing the courts to reconcile disputes. Here HB3619 conditions a proceeding to contest licensure upon a party posting a substantial bond, equal to 20% of the estimated cost of building the facility or the operational costs of an existing facility. Such a bond could easily equal or exceed hundreds of thousands of dollars. Should a party fail to post such a bond, the court is obligated to dismiss the action. HB3619 provides no means to challenge the licensure of an equine slaughter or processing facility except by posting the bond requirement. While HB3619 provides that indigent parties may have the bond waived, the bond's effect upon non-indigent parties with legitimate legal claims would be chilling. Such a prohibitive requirement would deter citizens from pursuing litigation to contest licensure of these type of facilities, and indeed the large amount of the bond seems to reinforce the perception that the bond's primary purpose is to discourage litigation opposing licensure.

[3] IL Const. art I, § 12 provides that "[e]very person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly."

2. The answer to Question 2 is pretermitted, given the response to Question 1 that HB3619 is constitutionally suspect under the Tennessee Constitution's Open Courts Clause.

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