

## TRIAL ADVOCACY

### Trial Advocacy: First Amendment

*Camp Legal Defense Fund, Inc. v. City of Atlanta*,  
451 F.3d 1257 (11th Cir. 2006)

A litigant asserting that a state law is an unconstitutional violation of the First Amendment does not have standing to raise an overbreadth challenge to any provisions of the law that do not apply to or affect its activities.

#### FACTS AND PROCEDURAL HISTORY

Coalition for the Abolition of Marijuana Prohibition (Camp), an organization engaged in advocating for reforms in marijuana laws, challenged certain provisions of an Atlanta ordinance governing outdoor festivals. The “Festivals Ordinance” required individuals or organizations to obtain permits for outdoor festivals, which were defined as events involving the “erection of stages, barricades, tents, booths, or other temporary structures.” *Camp Leg. Def. Fund*, 451 F.3d at 1263. The ordinance contained many provisions regulating various aspects of the permit-application process and festival characteristics. Among other things, the ordinance regulated the following: (1) it required applicants to apply for the permit at least ninety days before the date of the festival; (2) it exempted events sponsored by the City from permitting requirements; (3) it allowed the City to grant or deny the application within forty-five days of its submission; (4) it permitted the City to impose special limitations on the event and allowed other governmental entities to comment on the application; and (5) it mandated that the applicant have public liability damage insurance. When the ordinance passed, the City imposed a moratorium on the issuance of outdoor-festival permits until the ordinance’s effective date.

Camp sued after the City refused to accept its permit application during the moratorium period. Camp asserted that the moratorium violated its free speech rights, and that certain provisions of the ordinance unconstitutionally restrained its freedom of speech. The lower court granted partial summary judgments to both parties with respect to several of the ordinance’s provisions

and, following a bench trial, found the remaining provisions to be constitutional. The United States Court of Appeals for the Eleventh Circuit reversed and remanded in part.

#### ANALYSIS

The court first addressed Camp's right to challenge certain provisions of the ordinance and concluded that Camp could only challenge those provisions of the ordinance that affected its activities. The court rejected Camp's argument that the overbreadth doctrine allows it to challenge the entire ordinance as an impermissible restraint on the freedom of speech, reasoning that an injured party asserting jurisdiction under the overbreadth doctrine still has the burden of proving constitutional standing. According to the court, the overbreadth doctrine allows a litigant to facially challenge a law that may be unconstitutionally applied to third parties, but only after that litigant has challenged the statute as applied to the litigant's set of facts. Therefore, Camp lacked standing to challenge provisions of the ordinance that did not apply to its activities.

The court then agreed that Camp had standing to challenge the ordinance provisions giving city officials discretion over whether to grant permits. The court reasoned that the ordinance did not specify the criteria officials may consider in approving or denying a permit, and it exempted government-sponsored events from permit requirements. The court also noted that Camp was subject to the ordinance's procedural requirements because it had applied for permits in the past and would apply for permits in the future. The court rejected the City's argument that Camp could not challenge exemption provisions within the ordinance because the government had not denied the organization government sponsorship. The court reasoned that the mere existence of standardless requirements harmed Camp and determined that it is unnecessary for a litigant to be denied a permit under an unconstitutional statute in order to prove an injury sufficient to satisfy standing requirements. The court determined that the governmental exemption harmed Camp because the ordinance gave the organization only the two following options: meet the requirements to receive a permit or face prosecution for violating its mandates.

Finally, the court decided that Camp had standing to attack the provisions of the ordinance requiring the submission of permit applications at least ninety days before the event, as well as the insurance-coverage requirements, because these provisions were applicable to Camp's permit application. The court also held that Camp could challenge the City moratorium on permits. Although the moratorium had expired, the challenge was not moot as Camp sought economic damages for the alleged violation.

After specifying the claims for which Camp satisfied constitutional standing requirements, the court addressed the merits of the organization's claims.

First, the court rejected Camp's contention that the ordinance violated freedom of speech due to the City's discretion in granting permits and imposing special limitations in certain neighborhoods. The court determined that the provisions were not contrary to First Amendment rights because the provisions were "content neutral." The court noted that the City did not have "unbridled discretion," as Camp claimed, because the special limitations were limited to logistics, such as traffic and public safety, and had to be established before any festival permits were submitted. However, the court did find that the permit exemption for "city-sponsored events" restrained free speech because it placed burdens on events not endorsed by the City, yet removed those burdens from organizations the City chose to endorse. The court concluded that the ordinance needed to provide objective standards to ensure that the exemption for city-sponsored events would not be applied in a discriminatory manner.

Second, the court rejected Camp's claims that the ordinance's mandated ninety-day advance application period and insurance-coverage requirement violated the First Amendment. The court held that both provisions were content neutral because they applied to all festivals regardless of their content. The court also reasoned that the provisions were the least restrictive means to further the legitimate interests of the City's public health and safety. The court determined that the ninety-day advance application period gave the City time to evaluate the application and provided time for the applicant to seek judicial review if the City denied its request; also, the insurance-coverage requirement protected the City from property and/or bodily injury claims. The court then noted that both the ninety-day advance application

period and the insurance-coverage requirement left permit applicants with "alternative channels of communication." *Id.* at 1282–1283. The court reasoned that although the ordinance prohibited an applicant from "erect[ing] stages, barricades, utility poles, booths, tents or other temporary structures," it did not per se prevent the applicant from having an outdoor festival. *Id.* at 1282.

Third, the court held that the moratorium did not unconstitutionally impose a prior restraint on Camp's freedom of speech because it did not affect any constitutionally protected speech. The court noted that a prior restraint refers to a judicial order that forbids certain communication before the communication occurs or situations in which the government has complete discretion over providing access to a certain public forum. In this case, the court determined that the "moratorium did not 'limit access to a particular public forum'" because the moratorium's effect was to repeal the Festival Ordinance. *Id.* at 1283. Also, the court noted that, absent the ordinance, the City would not be constitutionally required to provide services pertaining to outdoor festivals.

#### SIGNIFICANCE

This case establishes that a litigant may not raise an overbreadth challenge to a statutory provision that does not apply to or affect its activities. The litigant must independently satisfy standing requirements by establishing the illegal nature of the statute as applied to it before it can facially attack the statute as unconstitutional as to a third party. The court emphasized the distinction between a challenge to a statute as applied to a litigant and a facial challenge to a statute, and it prohibited general challenges to a statute without an affirmative showing of actual injury to the litigant.

#### RESEARCH REFERENCE

- 16A Am. Jur. 2d *Constitutional Law* § 412 (Westlaw database updated May 2007).

Anesha Worthy

**Trial Advocacy: Workers' Compensation*****Jones v. Martin Electronics, Inc.*,  
932 So. 2d 1100 (Fla. 2006)**

An employee who is injured in the workplace and receives workers' compensation benefits, but does not pursue the compensation claim to a conclusion on the merits, may file an action against an employer for that injury, if the employer's conduct rises to the level of an intentional tort.

**FACTS AND PROCEDURAL HISTORY**

On May 1, 2000, Curtis Jones (Mr. Jones) suffered third degree burns over sixty percent of his body when an explosion occurred within one of Martin Electronics' buildings. Martin Electronics and its workers' compensation carrier immediately began providing benefits to Mr. Jones. A dispute arose between the Joneses and Martin Electronics over the hourly rate for attendant care that Mrs. Jones provided Mr. Jones. Mr. Jones filed a petition with the Office of the Judges of Compensation Claims to increase the amount given for attendant care. On this petition, Mr. Jones circled "yes" to the question of whether his accident was accepted as compensable. The judge of compensation claims granted the petition, and the First District Court of Appeal affirmed the ruling.

While receiving workers' compensation benefits, the Joneses filed a complaint in circuit court seeking tort damages for Mr. Jones' injuries. They claimed that the injuries were the result of intentional conduct on the part of Martin Electronics that was substantially certain to result in injury or death. Martin Electronics sought summary judgment because Mr. Jones elected workers' compensation as his remedy which precluded him from recovering in tort. The trial court denied Martin Electronics' motion for summary judgment; however, the First District reversed and found that Mr. Jones elected workers' compensation as his remedy. In addition, the First District certified the question of remedy to the Florida Supreme Court. The Florida Supreme Court quashed the decision of the First District and remanded the case with instructions.

## ANALYSIS

Florida's Workers' Compensation Act provides that the liability of any employer prescribed in the Act shall be exclusive and in place of all other liability. Fla. Stat. § 440.11(1) (2000). This statute affords the employer immunity from liability for negligence that has resulted in an employee's injury. However, the Florida Supreme Court has held that an employer's immunity under the workers' compensation system does not extend to workplace injuries caused by an employer's reckless conduct when that conduct is equivalent to an intentional tort. *Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 90 (Fla. 2005). Workers' compensation limits employer liability for negligent conduct, but does not grant immunity to employers for intentional tortious conduct. *Id.* The Court explained that precluding a worker from pursuing a remedy for a workplace injury caused by an employer's intentional conduct would be contrary to the intent of Florida's workers' compensation system. *Jones*, 932 So. 2d at 1105.

The Court disagreed with the district court's assertion that Mr. Jones elected his exclusive remedy under the workers' compensation statute by filing for an adjustment in the rate of attendant care. The district court opined that when Mr. Jones filed this adjustment, he made a conscious decision to choose compensation benefits over a tort action. The Florida Supreme Court disagreed with the lower court's conclusion that Mr. Jones did enough to forgo his remedy in tort. The Court explained that, although the point at which a person elects workers' compensation as the exclusive remedy is not entirely clear, Florida courts have stated that the "mere acceptance of some compensation benefits . . . is not enough to constitute an election" of remedies. *Velez v. Oxford Dev. Co.*, 457 So. 2d 1388, 1390 (Fla. 3d Dist. App. 1984).

To constitute an election of remedies, the injured employee must pursue the workers' compensation remedy to determination or conclusion on the merits. *Wheeled Coach Indus., Inc. v. Annulis*, 852 So. 2d 430, 433 (Fla. 5th Dist. App. 2003). Evidence of a conscious intent on behalf of the claimant must exist to waive other rights. *Id.* In *Annulis*, an employee was killed while working on a truck and the employer's workers' compensation carrier began making payments without the employee's widow ever filing a workers' compensation claim. *Id.* at 432. Similar to *Jones*, the claimant in *Annulis* filed a petition with the Office of the Judges

of Compensation Claims seeking a change in the payment schedule. *Id.* at 431. After the judge granted the petition, the widow filed a wrongful death action, and the employer moved for summary judgment on the same grounds as those presented in *Jones*. The Fifth District Court of Appeal found that the widow did not file a claim for benefits; rather, she filed only for an interim change. *Id.* at 432. Further, the widow had not proceeded to a conclusion of the workers' compensation claim on the merits. *Id.*

The Court applied the holding in *Annulis* to Mr. Jones's claim and found that the petition for an adjustment in attendant care benefits did not constitute an election, and therefore did not amount to an inconsistent election of remedies. The Court explained that the petition was simply a request for a change in the rate used to calculate a benefit that the carrier was already voluntarily providing to the Joneses. The Court went on to say that the only matter that the parties litigated dealt with the rate for attendant care, not whether Mr. Jones's injury was compensable or caused by neglect or intent. Therefore, the petition, hearing, and court order did not constitute litigation to a conclusion on the merits sufficient to preclude Mr. Jones from electing to sue in tort.

After the Court concluded that a hearing on a rate adjustment was not tantamount to litigation on the merits, it briefly analyzed whether Mr. Jones intended for workers' compensation to be his sole remedy. The Court held that circling "yes" to the question of whether Mr. Jones accepted his accident as compensable on a pretrial form questionnaire did not rise to the level of conscious intent to elect the compensation remedy and forgo his other rights. The Court explained that the purpose of the questionnaire was to outline the disputed issues and was not enough to constitute a waiver of any common law rights against Martin Electronics.

Finally, the Court addressed the potential concern that an employee could get double recovery. The Court acknowledged that a tort action may allow an employee to recover some of the same damages recoverable under workers' compensation. However, the common law award for intentional tortious conduct represents a supplemental remedy for damages such as pain and suffering and loss of spousal services, which workers' compensation does not provide. Further, the tort action allows for the imposition of puni-

tive damages against an employer who intentionally injures its employees. Ultimately, the Court explained that the injured employee would still only be eligible to recover each element of damage once. The Court noted that if an injured employee files a civil action for damages previously compensated by workers' compensation, the carrier is authorized to file a notice of payment of benefits which operates as a lien on any subsequent judgment. Even if the carrier fails to file the notice, Florida's collateral-source statute, which encompasses workers' compensation claims, requires courts to reduce the amount of damages by the total amount paid.

#### SIGNIFICANCE

In *Jones*, the Florida Supreme Court established that an employee receiving workers' compensation benefits does not forgo a tort remedy by litigating with regard to the rate of those benefits, at least where the employee has not demonstrated a conscious intent to elect workers' compensation as his sole remedy. Merely stating that an accident is compensable does not constitute such a conscious intent.

#### RESEARCH REFERENCES

- 6 Fla. Prac. § 22.7 (Westlaw 2006).
- John T. Burnett, *The Enigma of Workers' Compensation Immunity: A Call to the Legislature for a Statutorily Defined Intentional Tort Exception*, 28 Fla. St. U. L. Rev. 491 (2001).

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