Case Western Reserve Law Review

Volume 16 | Issue 2

1965

Constitutional Law--Ohio Billboard Statutes--Valid Exercise of State Police Power

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or confusion to customers may be present. It appears, however, that the effectiveness of palming off has not been extinguished, for the majority of recent decisions construing *Sears* and *Compco* infer that recovery for unfair competition may be had in its presence. But since palming off is difficult to prove and absent in most cases, the only protection remaining which would afford a plaintiff relief against product simulation is state law requiring a copier to take such precautionary measures as labeling. But this merely protects the consumer against confusion as to the source of the product; it does not grant the originator the right to exclude others from making and selling the product. Such a result is consonant with the policy that whatever is not protected by federal patent or copyright law lies in the public domain and may be copied at will.

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CONSTITUTIONAL LAW — OHIO BILLBOARD STATUTES — VALID EXERCISE OF STATE POLICE POWER

Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (1964) *

Billboard statutes by their nature impose restrictions on the right of a private property owner to an unlimited use of his land. The state justifies these restrictions on the rights of private property owners as a valid exercise of the state police power.[1] The police power is inherent in the state[2] and has as its purpose and scope the general welfare of the state.[3] In this respect, it must be based upon public necessity. The recent pronouncement by the Ohio Supreme Court in *Ghaster Properties, Inc. v. Preston*[4] raises a question as to the scope of the term "public necessity"

* The trial court decision in the subject case is noted in 14 W RES. L. REV. 819 (1963). The subsequent disposition of the case in the Ohio Supreme Court makes this a highly propitious time for a re-examination of an exercise of the police power to regulate billboards in Ohio.

1. Although the usual justification for a statute of this type is a necessary use of the police power of the state, an interesting argument has been raised to base the statute on real property law. In Wilson, *Billboards and The Right To Be Seen From the Highway*, 30 GEO. L.J. 723 (1942), the writer argues that since the easement of visibility which arises by virtue of the abutter's location is an easement appurtenant, its exploration is necessarily restricted to the purposes connected with the use and enjoyment of the dominant estate. Since an appurtenant estate is concerned here, it would follow that the owner of the fee cannot authorize others to utilize the easement for purposes unconnected with the use and enjoyment of the dominant estate.

2. State *ex rel* Zugravu v. O'Brien, 130 Ohio St. 23, 196 N.E. 664 (1935); Van Gunten v. Worthley, 25 Ohio App. 496, 159 N.E. 326 (1927).

3. State v. Boone, 84 Ohio St. 346, 95 N.E. 924, *aff'd*, 85 Ohio St. 313, 97 N.E. 975 (1911); Mirick v. Gims, 79 Ohio St. 174, 86 N.E. 880 (1908); Champaign County v. Church, 62 Ohio St. 318, 57 N.E. 50 (1900); see OHIO CONST. Preamble.

4. 176 Ohio St. 425, 200 N.E.2d 328 (1964).

in Ohio. More specifically, the *Ghaster* case involves the Ohio billboard statutes which restrict types of advertising devices[5] and prohibit placing these devices within 660 feet of the edge of the right of way of a highway in the interstate system.[6] All advertising devices which violate this statute are declared a public and private nuisance and are subject to removal by the state thirty days after notice to the owner or lessee of the land.[7]

In the *Ghaster* case, the plaintiff owned three parcels of land which had been leased to another plaintiff, Ghaster Outdoor Advertising Company. The Ghaster Company, as lessee, had maintained seven outdoor advertising signs on this land which were alleged to be in violation of sections 5516.01 and 5516.02 of the Ohio Revised Code. The trial court declared the statutes unconstitutional, holding that they constituted a taking of property in violation of the due process clause. In this respect, the court found that the statutes had no substantial relation to public health, safety, morals, or general welfare.[8]

The court of appeals reversed in part, holding that although there was no evidence upon which to base a finding that the Ghaster signs constituted any threat to the safety of the traveling public or to the public in general, the state might have the authority *independent of the police power* to justify the enforcement of the billboard statutes. However, the court avoided further discussion of this point by holding the statutes unconstitutional as applied in the case before them.

> We conclude that in its application *to the subject properties* of Ghaster Properties, Inc. it is unconstitutional.
>
> On the evidence herein we cannot and do not determine the constitutionality of said Bill in its application to other properties not herein specifically involved nor do we determine the constitutionality of said Bill in its enactment.[9]

The supreme court, however, declared the statutes to be constitutional, both in enactment and application.[10] Using the definition of "taking" in

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5. OHIO REV. CODE § 5516 [hereinafter cited as CODE §].

6. CODE § 5516.02.

7 CODE § 5516.04.

8. Ghaster Properties, Inc. v. Preston, 184 N.E.2d 552, 557 (Ohio C.P. 1962), noted in 14 W RES. L. REV. 819 (1963) Defendant attempted to prove that there was a substantial relation between the statutes and highway safety. The court held that there was no evidence to show that billboards caused accidents, but rather that they tend to alert drivers, to keep them actively attentive to roadway conditions, thereby preventing "highway hypnosis."

9. Ghaster Properties, Inc. v. Preston, 194 N.E.2d 158, 161 (Ohio Ct. App. 1963) (Emphasis added.)

10. Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 200 N.E.2d 328 (1964)

11. 176 Ohio St. 282, 199 N.E.2d 595 (1964) Judge Matthias declared that an actual taking of private property must involve either physical displacement of a person from space in which he was entitled to exercise dominion consistent with ownership or by showing that a specific injury was sustained by a person which differs substantially in kind from others in the neighborhood.

McKee v. City of Akron,[11] the court declared that depriving an owner of an unrestricted use of his land does not necessarily amount to a taking of his property, but is rather a restriction of the superadded claim to use private lands to intrude on the public ways.[12] The court further stated that the billboard statutes do bear a real and substantial relation to public welfare by (1) "promoting public safety," and (2) "promoting the comfort, convenience, and peace of mind of those who use the highway, by removing annoying intrusions upon that use."[13] Once the issue of constitutionality had been resolved, the court found no difficulty in applying the billboard statutes to the seven Ghaster signs, although only three of the signs were visible on an interstate highway.[14]

The court's two reasons for upholding the statutes as being a valid exercise of state police power deserve further analysis. The general requisite of a valid exercise of police power was stated in *City of Youngstown v. Kahn Bros. Bldg. Co.*,[15] wherein the court held that "there must be an essential public need for the exercise of the police power in order to justify its use."[16] More specifically, the factors upon which a valid exercise of police power may rest are usually limited to four: (1) health, (2) safety, (3) morals, and (4) general welfare. Thus, an exercise of the police power will usually be considered valid only if it bears a real and substantial relation to these four categories of public need.[17] For example, in considering the validity of zoning ordinances, the court in *Curtis v. City of Cleveland*[18] stated that "such legislation will not be considered invalid . . within the meaning of constitutional limitations, where such

12. Ghaster Properties, Inc. v. Preston, 176 Ohio St. 424, 430, 200 N.E.2d 328, 332 (1964). On this point the court also cited General Outdoor Advertising Co. v. Department of Pub. Works, 289 Mass. 149, 193 N.E. 799 (1935). *Id.* at 432, 200 N.E.2d at 334.

13. Ghaster Properties, Inc. v. Preston, *supra* note 12, at 438, 200 N.E.2d at 337. Plaintiff attempted further to raise the argument that the statutes involved in the instant case were unconstitutional because they infringe the right of free speech. This bizarre argument, discussed in 64 COLUM. L. REV. 81 (1964), was attempted in New York v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, *appeal dismissed*, 375 U.S. 42 (1963). In that case, defendant strung clotheslines in her front and side yards protesting property taxes. A zoning ordinance, Rye, N.Y., General Ordinances, § 4-37 (1961), was passed which prohibited erection and maintenance of clotheslines in front and side yards without a permit from the city. Defendant's application for such a permit was denied, but she continued to display the lines and was subsequently convicted of violating the ordinance. Defendant claimed that the clothesline display was a form of nonverbal protest against the tax assessment and that the ordinance was invalid as to her because it constituted an unconstitutional infringement on her freedom of speech.

14. Of the seven Ghaster signs, one was visible to traffic on Interstate Route 75 only, two were visible to traffic on Interstate Route 75 and on access roads leading thereto, and four were *not* visible to traffic on Interstate Route 75, but only to traffic on such access roads.

15. 112 Ohio St. 654, 148 N.E. 842 (1925).

16. *Id.* at 661, 148 N.E. at 844.

17. Curtis v. City of Cleveland, 170 Ohio St. 127, 163 N.E.2d 682 (1959); Benjamin v. City of Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957); City of Cincinnati v. Correll, 141 Ohio St. 535, 49 N.E.2d 412 (1943); Olds v. Klotz, 131 Ohio St. 447, 3 N.E.2d 371 (1936); Smith v. Troy, 18 Ohio L. Abs. 476 (Ct. App. 1934).

18. 170 Ohio St. 127, 163 N.E.2d 682 (1959).

legislation bears a real and substantial relation to the public health, safety, morals or general welfare and is not unreasonable or arbitrary"[19]

Although repeated attempts have been made to extend the general welfare category to include aesthetics as a basis for a valid exercise of police power, the Ohio courts have not favored legislation founded solely on aesthetic considerations.[20] Even though the courts have been sympathetic to aesthetic considerations, they still find no valid basis upon which to uphold such legislation. For example, in *State ex rel Srigley v Woodworth*,[21] the court expressed the obvious dilemma. "It seems unfortunate that the police power is adequate to prohibit offensive sounds and smells, but is helpless against things that are only ugly in appearance and such is the undoubted rule, that the police power cannot be invoked by esthetic considerations."[22]

The state is therefore charged with a difficult task in determining the extent of its police power: balancing a property owner's right to the use of his property against the common good of the citizen of the state guarded by police power.[23] Applying these principles to the billboard statutes, a court must determine whether the subsequent benefits to the citizens of the state, *e.g.*, public safety on the highway, are sufficient to warrant a restriction on private property In *Ghaster*, the court's two reasons for upholding the Ohio billboard statutes are difficult to justify First, the public safety argument seems extremely weak as a reason for prohibiting advertising signs. The plaintiff supplied evidence which demonstrated that these signs were not traffic hazards.[24] However, the court refused to consider this evidence because it felt that this was a matter for the legislature, and that legislative determination and judgment should not be disturbed unless manifestly unreasonable.[25] The general welfare argument, or as phrased by the court, "promoting the comfort, conven-

19. *Id.* at 130, 163 N.E.2d at 685.

20. See State *ex rel* Jack v. Russell, 162 Ohio St. 281, 123 N.E.2d 261 (1954); Wondrak v. Kelley, 129 Ohio St. 268, 195 N.E. 65 (1935); Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925); Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 110 N.E.2d 440 (1952); Peebles v. State, 25 Ohio L. Abs. 545 (Ct. App. 1937)

21. 33 Ohio App. 406, 169 N.E. 713 (1929).

22. *Id.* at 411, 169 N.E. at 715.

23. See, *e.g.*, Direct Plumbing Supply v. City of Dayton, 138 Ohio St. 540, 38 N.E.2d 70 (1941)

24. At the trial court level, plaintiff propounded certain interrogatories which were answered by defendant. Defendant did not have any official record which showed or purported to show that any accident had ever been caused on any state highway in the State of Ohio by an advertising sign located off the highway right-of-way on private property.

25. In the trial court it was stated that billboards are not safety hazards and "if any such relation is shown, at all, it is to the effect that these devices *are beneficial to safety.*" Ghaster Properties, Inc. v. Preston, 184 N.E.2d 552, 557 (Ohio C.P 1962) (Emphasis added.) See also United Advertising Corp. v. Borough of Metuchen, 76 N.J. Super. 301, 184 A.2d 441 (1962), wherein a New Jersey court decided after considering two traffic accident studies that billboards were neither a traffic hazard nor a nuisance.

ience, and peace of mind of those who use the highway" is even weaker. Here, the court apparently gave substantial consideration to the negative effect such signs may have on the beauty of a given landscape. Advocating a retention of natural beauty along the highway would indicate that the court sought to promote aesthetics.[26] Thus, although Ohio courts have long held that aesthetics alone do not constitute a sufficient basis for a valid exercise of the police power, it would seem that the supreme court departed from the established law in *Ghaster* By inserting aesthetics into the general welfare category, the court has in effect held that aesthetics now constitutes a valid basis in Ohio for exercise of the police power. Furthermore, the court has, by implication, said that the Ohio legislature is competent to determine both what beauty is and that this beauty is what the community likes and acclaims as necessary. Also, the court in effect has said that the community as a whole believes that the natural landscape is appealing to the aesthetic sense — so appealing and so necessary as to outweigh the rights and interests of private property owners.

The importance of the *Ghaster* decision does not lie in whether the result may be in keeping with the general demands of the community, but rather in the court's implication that aesthetics is now a matter of general welfare in Ohio; hence a sufficient basis for a valid exercise of police power. Now that the initial step has been taken, it will be left to future courts to either limit the *Ghaster* decision to its facts, or enlarge upon the court's reasoning and develop aesthetics as a basis for police power exercise in areas other than billboard regulation. The consequences of such an extension would be serious, the greatest of which is perhaps a complete loss of personal aesthetic choice.

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26. Chief Justice Taft's opinion in *Ghaster* states that "beauty may not be queen but she is not an outcast beyond the pale of protection or respect. The maintenance of the natural beauty of areas along interstate highways is to be taken into account in determining whether the police power is properly exercised. Outdoor life must lose much of its charm and pleasure if this form of advertising is permitted to continue unhampered. " Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 436-37, 200 N.E.2d 328, 336-37 (1964).