

SUPREME COURT

STATE OF ARIZONA

TAMMIE C. BENNETT and JAMES)	
A. BENNETT, wife and husband,)	Arizona Supreme Court
dba OLD TOWN SQUARE ARTS)	No. CV-04-0215-PR
AND CRAFTS FESTIVAL,)	
)	
Plaintiffs/Appellants)	Court of Appeals
)	Division One
)	1CA-CV 03-0233
v.)	
)	YAVAPAI County
GERHAL BROWNLOW and CAROL)	Superior Court
BROWNLOW, husband and wife;)	No. CV 01-0567
YAVAPAI COUNTY, a political)	
subdivision of the State of Arizona,)	
)	
Defendants/Appellees.)	

**SUPPLEMENTAL BRIEF
OF
PLAINTIFFS/APPELLANTS/RESPONDENTS BENNETT**

Kenton D. Jones - State Bar No. 011897
100 E. Union Street
Post Office Box 3840
Prescott, Arizona 86302-3840
(928) 776-2457
Attorneys for Plaintiffs/Appellants/
Respondents

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THE FOLLOWING Supplemental Brief is filed timely and as directed by the Court through its Order of January 5, 2005.

I. THE COURT OF APPEALS PROPERLY ANALYZED THIS ISSUE UNDER FIRST AMENDMENT PUBLIC FORUM PRINCIPLES.

This Court has asked that the Parties address whether the Court of Appeals erred in analyzing the Plaintiff's claim under First Amendment public forum principles. In fact, the Court of Appeals did not err in its analysis.

A. The Yavapai County Courthouse Plaza Is A Traditional Public Forum.

Within Appellants Opening Brief before the Court of Appeals it was stated that neither Party had taken the position that the Courthouse Plaza in Prescott is not a traditional public forum. (Appellant's Opening Brief, Pages 17-18). That position was not disputed within Appellee's Response and is not even raised as an issue within their Petition For Review. Within Appellants Response to the Petition for Review the issue of the status of the Plaza as a public forum was again addressed by Appellants, therein taking the same position Appellant has taken throughout this litigation. (Response to Petition, Section II, Page 1). The Court of Appeals found that the Courthouse Plaza was a public forum. (Opinion, Pages 10-11, Paragraph 19).

In fact, the Yavapai County Courthouse Plaza in Prescott is probably the

quintessential public forum. The steps of the Courthouse are the location upon which Barry Goldwater chose to announce his campaign for the Presidency and the location upon which every Republican officeholder and candidate since the days of Barry Goldwater has sought to legitimize and empower his campaign. When then-Presidential candidate George W. Bush flew to Northern Arizona before the election of 2000, he stood on the steps of that same Courthouse in the same position Goldwater stood and spoke to those assembled, and on November 1, 2004, the Republican portion of Arizona's Congressional delegation flew to Prescott for a "pre-general election" rally in the same place on those same Courthouse steps.

The Appellant has argued that the Courthouse Plaza, generally, has been traditionally open to the public for expressive activity and, as such, any regulation of the speech activity on the Plaza, as is the case with public streets and other parks, is traditionally examined under strict scrutiny. *United States v. Kokinda*, 497 U.S. 720, 726-727 (1990). The Court of Appeals, however, found that this case did not involve restrictions on traditional speech, but access to a public place. (Opinion, Page 7, Paragraph 14). In application, the Courthouse Plaza Ordinances denied *access* to this traditional public forum to anyone seeking to put on an expressive event unless they were previously approved by the government as a

non-profit organization. (Opinion, Page 3, Section 5).

While the Court of Appeals did not believe that “traditional speech” was the issue, First Amendment analysis still applied in that *access* to the Courthouse Plaza is protected by the First Amendment, as well. (Opinion, Section 14, Page 7 [Citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799 (1985)]).

B. First Amendment Authority Extends First Amendment Protections To The Sale And Exhibition Of Artwork.

Given that access to the Courthouse Plaza is protected, the question then becomes whether the conduct for which access is sought is protected. The Appellees have argued that what was precluded by the Yavapai County Board of Supervisors through passage of the Courthouse Plaza Ordinance was *conduct* rather than speech, and commercial conduct, at that. (Petition For Review, Page 5). In support of their position the Appellees cite *ABC Home Furnishings v. Town Of East Hampton*, 947 F.Supp. 635, 643 (EDNY 1996). ABC wanted:

“to hold a cocktail party and conduct a three day sale of merchandise.

...”

ABC, at 639.

The underlying issue in *ABC* arose when:

“... the Town Board passed Resolution # 680 which revoked the permit for the Event on the ground that the Event was being run as a commercial enterprise rather than a charity event and that the land where the sale was to be held was zoned for residential rather than

commercial use. Accordingly, permitting the sale to go forward would be in violation fo the Town zoning ordinance.”

ABC, at 640.

In finding no violation of the First Amendment, the Court held that the Town’s revocation of the permit demonstrated an effort to regulate the Event, i.e., the activity underlying the speech, not the speech itself. *ABC*, at 643. As such, *ABC* is not instructive to the Court. Access to public property was not implicated and the Town of East Hampton was simply enforcing its zoning requirements and not speech.

However, directly on point is *Bery et.al. v. City of New York*, 97 F.3d 689 (2nd Cir. 1996), wherein the Court held that “visual artists” have the protected right to exhibit, *sell or offer their work for sale in public places*. *Bery*, at 696. The Court in *Bery*, and contrary to the position of the Appellees in this case, rejected the argument that the sale of art is *conduct* not protected by the First Amendment, holding that, “the sale of protected material is also protected.” *Bery*, at 695.

The Court in *Bery*, even addressed the issue of the extent to which art must be “political” or “controversial” in order to be afforded First Amendment protection. Therein, the Court held:

“... The First Amendment’s purposes ... is to protect all forms of peaceful expression in all of its myriad manifestations. [citation omitted] ... Our cases have never suggested that expression about

philosophical, social, artistic, economic, literary or ethical matters ...
is not entitled to full First Amendment protections. [citation omitted].
...”

Bery, at 694, 695.

The *Bery* Court went on to say:

“... While these objects may at time have expressive content, paintings, photographs, prints and sculptures, such as those appellants seek to display and sell in public areas of the City, always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protections. ...”

Bery, at 696.

And finally, the *Bery*, Court held that paintings, photographs, prints and sculptures, that the Appellants sought to display and sell in public areas of the City, always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protections. *Bery*, at 696. In citing to the language of *Bery*, the Court of Appeals found that:

“... many vendors in the Courthouse Plaza sell products that do not express a viewpoint or message. Nevertheless, because the central issue of this case is not about regulating traditional speech, but access to public property, we conclude that First Amendment analysis is appropriate. [Citing *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989)¹

(Opinion, Page 80).

¹ “Here, the bandshell was open, apparently, to all performers; and we decide the case as one in which the bandshell is a public forum for performances in which the government’s right to regulate expression is subject to the protections of the First Amendment.”

C. Sponsorship Of Protected Activity Is Also Afforded First Amendment Protection.

The sponsorship of expressive events, such as the arts and crafts show in the present case, is afforded First Amendment protection in the same manner as the artist or other performer within the event. In *Ward v. Rock Against Racism*, 491 U.S. 781, the First Amendment issue was *not raised* by the performers, but by the sponsor of the event. *Ward*, at 784. In that regard, *Ward* states:

“Although the city’s sound technician controlled both sound volume and sound mix by virtue of his position at the mixing board, the court found that “[t] City’s practice for events at the Bandshell is to give the sponsor autonomy with respect to the sound mix: balancing treble with bass, highlighting a particular instrument or voice, and the like,” and that the city’s sound technician ‘does all he can to accommodate the sponsor’s desires in those regards.’ Even with respect to volume control, the city’s practice was to confer with the sponsor before making any decision to turn the volume down. . .”

Ward, at 788.

Effectively, the sponsor in *Ward* was not even allowed the artistic “expression” of operating the sound equipment. However, and consistent with the Court of Appeals’ conclusion in the immediate case, the organizer of protected activities is entitled to the protection of the Constitution to a similar degree as those performing the activities. (Opinion, Page 9, Paragraph 16).

As such, First Amendment protections are extended to 1) access to a public forum, 2) for the exhibition and sale of art, and 3) the sponsors of exhibitions and

sales of art in public fora. All three of these elements exist in the immediate case and, as such, application of First Amendment analysis was appropriate.

II. IN REGARD TO THE ISSUE OF FIRST AMENDMENT ANALYSIS THE APPELLEE HAS ADMITTED THAT AN INTERMEDIATE LEVEL OF SCRUTINY WAS APPROPRIATE.

The Court of Appeals determined that the Courthouse Plaza Ordinances did not make any distinctions based upon the nature of the event or the person or cause being benefitted.² As a result, the Court of Appeals found that the Ordinance did not need to be narrowly tailored to serve a *compelling* state interest, but that time, place and manner restrictions should meet the slightly lesser standard of being narrowly tailored to serve a *significant* government interest. (Opinion, Pages 11-12, Paragraph 20). In fact, the Court of Appeals went so far as to say that the means chosen need not be a perfect fit, or the least restrictive, *but must be narrowly tailored to achieve the desired objective*. (Opinion, Page 12, Paragraph 21).

The Appellee in this matter has stated within their Petition For Review that:

“The court of appeals subjected the Ordinance to ‘intermediate

² Appellant disagrees with the Opinion of the Court of Appeals on this point as the Ordinance distinguishes between for profit persons and non-profit sponsors, *i.e.* corporate “persons”, with the speech right of the non-profit organization being approved by the government and the for profit entity being denied access solely because the government has not approved them to speak.

scrutiny,' which requires that the regulation be content-neutral, serve a significant government interest and be narrowly tailored, leaving adequate alternative channels for expression. . . . But its analysis more closely resembles strict scrutiny. Although *intermediate scrutiny is the appropriate test under Supreme Court precedents*, the court misapplied it by giving no deference to the policy decisions of the Board of Supervisors." [Citation omitted].

Petition, Pages 7-8.

In fact, the Court of Appeals methodically addressed the three bases stated by the Appellee as the significant interest of the Appellee that were allegedly narrowly tailored to achieve each desired objective.

The first reason stated for distinguishing between for profit and non-profit organizations promoting the same events on the Courthouse Plaza was that the Ordinance restricted the number of events and helped to maintain the character of the Courthouse Plaza. However, as pointed out by the Court, before and after the passage of the Ordinances there were the same number of events and the same number of vendors with the only difference being that the for profit sponsors were gone. (Opinion, Page 13, Paragraph 23). Clearly, the Ordinance was not narrowly tailored to accomplish *that* stated end.

Second, the Appellee stated that limiting the sponsorship of the events to non-profit organizations avoided competition with local merchants. The Court of Appeals pointed out that the *business* being conducted at the event was being

conducted by the vendors and not the sponsors. For profit vendors were selling their goods in competition with local merchants whether there was a for profit or non profit sponsor. (Opinion, Page 14-15, Paragraph 25). As such, the Ordinance change did *nothing* to meet this stated end.

Finally, Appellee argued that by allowing only non-profits to sponsor the events it brought greater benefits to the community. The Court of Appeals stated that this was a *valid* interest, but not necessarily *significant* or narrowly tailored. (Opinion, Page 15, Paragraph 26).

Effectively, until passage of the new Courthouse Plaza Ordinances, the for profit sponsor “ran the show”, affiliated with a non-profit organization for tax benefit purposes, and whatever deal the for profit sponsor cut with the non-profit determined how much money went into the coffers of the non-profit. Under the new Ordinances, the non-profit organization is the sponsor, they affiliate a for profit entity that runs the show and as was the case before, whatever deal the for profit sponsor cuts with the non-profit determines how much money goes into the coffers of the non-profit.

The amended Ordinance changed nothing, and certainly did nothing to obtain the desired ends the Appellee states they sought. And beyond that, the Appellee has yet to address how it is that seeing non-profits obtain the monies

from the promotion of such events constitutes a “significant interest” of the state.

III. CONCLUSION.

While the Appellee insists that “deference” must be given to the decision of the Board of Supervisors (Petition for Review, Pages 7-8), what Appellee is asking this Court to do is turn a blind eye *not* to the wisdom of the County Supervisors but to the fact that it is glaringly apparent that *nothing* about the bases they assert as being the “significant interest” they have allegedly “narrowly tailored” the Ordinance to address even makes sense. There must be a distinction under the law between “showing deference” and simply accepting a subterfuge as justification.

In truth, the difficulty the Appellee has in explaining their justification for the Ordinance is that the Ordinance was created to do none of the things they have asserted. The Ordinance change was brought about in order to disqualify the Appellants as potential applicants.³ The “justification” came about “after the fact” when the Appellees came to understand that they would have to justify passage of the Ordinance under First Amendment analysis in a Court of law.

First Amendment analysis was appropriately applied by the Court of Appeals and their Opinion should be allowed to stand.

³ See Appellants’ Opening Brief, Statement of the facts, Page 8.

RESPECTFULLY SUBMITTED, this 4th day of February, 2005.

By:


Kenton D. Jones

Attorney for Plaintiffs/

Appellants/Respondents

Tammie C. & James A. Bennett

ORIGINAL and 6 copies of the
foregoing mailed this 4th
day of February, 2005, to:

Noel K. Dessaint, Clerk
Supreme Court of Arizona
1501 W. Washington
Phoenix, Arizona 85007-3329

TWO COPIES of the foregoing
mailed this 4th day of
February, 2005, to:

Georgia A. Staton
Randall H. Warner
JONES, SKELTON & HOCHULI
2901 N. Central Avenue, Suite 800
Phoenix, Arizona 85012
Attorneys for Petitioner

By:

