UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

October 21, 1981

CHAMBERS OF
CORNELIA G. KENNEDY
CIRCUIT JUDGE
U.S. COURT HOUSE
DETROIT, MICHIGAN 48226

John P. Hehman, Clerk
United States Court of Appeals
for the Sixth Circuit
Cincinnati, OH 45202

Re: No. 80-3436, Stephens et al.
v. Painesville Raceway
10/12/81

Dear Mr. Hehman:

Please sign and enter the enclosed order in the above case.

Judges Merritt and Unthank have concurred.

Sincerely,

Cornelia G. Kennedy

Enc.

cc: Judge Merritt
Judge Unthank

1.

J. Merritt

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PANEL REPORT

DATE: Monday, October 12, 1981, #1, 1:30 p.m.

PANEL: [redacted], Kennedy, and Unthank

NO: 80-3436, Stephens, et al. v. Painesville Raceway, etc.
N.D. Ohio - Contie, J.

Attached for your review is an order in the above-entitled case, which is being circulated in lieu of a panel report. It is called to the particular attention of Judges [redacted] and Unthank.

Cornelia G. Kennedy

Enc.

cc: ~~All Judges~~

RECEIVED
OCT 15 1981
GILBERT S. MERRITT
U.S. Circuit Judge

1.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PANEL REPORT

DATE: Monday, October 12, 1981, #1, 1:30 p.m.

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Attached for your review is an order in the above-entitled case, which is being circulated in lieu of a panel report. It is called to the particular attention of Judges Merritt and Unthank.

Cornelia G. Kennedy

Enc.

cc: All Judges

October 16, 1981

Dear Judge Kennedy:

I concur.

G. Wix Unthank

NO. 80-3436

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ART STEPHENS, MARK GENTER,
and JOHN D. GALLO,

Plaintiffs-Appellants,

v.

PAINESVILLE RACEWAY, INC.,
CHARLES ALATIS and OHIO STATE
RACING COMMISSION,

Defendants-Appellees.

_____/

O R D E R

Before: MERRITT and KENNEDY, Circuit Judges; and UNTHANK, District Judge.*

This case raises the question whether the arbitrary denial of horse stall space at a racetrack by the party leasing the track may be the subject of an action brought under 42 U.S.C. § 1983. The Honorable Leroy J. Contie, Jr., District Judge for the Northern District of Ohio, ruled that on the facts before him the element of state action was lacking, and dismissed the complaint. We affirm.

Appellants Stephens, Genter, and Gallo, plaintiffs below, drive or train harness racehorses. Appellee Painesville Raceway, Inc. is a private company that in the spring of 1980 leased the Northfield Park Racetrack, a privately-owned racetrack, to conduct a harness racing meet. Painesville provided stall space free of charge to participants in the meet under an

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* The Honorable G. Wix Unthank, United States District Court, Eastern District of Kentucky, sitting by designation.

agreement that permitted Painesville to evict the occupant of a stall at any time for any reason. Appellants agreed to accept stall space on a temporary basis at the start of the meet in question, but they were evicted three weeks later, on April 5, 1980. They were not given a hearing before the eviction. The parties do not agree on the motive for the eviction, but for purposes of this decision we will accept appellants' story that they were evicted solely because the Painesville management disliked them. The eviction only forced appellants to find another place to stable their horses. It did not prevent appellants' racing at the track.

Before reaching the state action question we address appellees' claim that this case is now moot. We cannot agree with appellees that the case was mooted when the racing meet ended on June 7, 1980. This is a classic example of an issue "capable of repetition yet evading review." Roe v. Wade, 410 U.S. 113, 125 (1973). A racing meet is less than three months long. If appellants' case was mooted when the meet ended, they would never get appellate review of a decision to deny them stall space.

Nor is this case moot because there is no proof that appellants are likely to be denied stall space in the future. The question is whether the issue is capable of repetition. Finally, appellants' failure to offer proof of damages does not moot their claim for damages. It only means that on the merits appellants would lose because they have not met their burden of proof. See George E. Hoffman & Sons, Inc. v. International Brotherhood of Teamsters, 617 F.2d 1234, 1247 (7th Cir. 1980).

Appellants argue that Painesville Raceway's decision to deny them stall space was the act of the State of Ohio for the following reasons: Painesville needs a permit from the state to conduct meets; horse racing is under the "general supervision" of the Ohio State Racing Commission; Ohio receives most of the profits from the money wagered at the races, and uses the fund created to improve racing; all agreements between Painesville Raceway and horsemen must be submitted to the Racing Commission; Ohio requires Painesville to operate a security force, and it was a security guard who delivered the eviction notice to appellants.

The act of a private party is state action for the purposes of section 1983 if the state is in a symbiotic relationship or joint venture with the private party. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-177 (1972). Although the State of Ohio benefits from harness racing and exercises a good deal of control over it, we agree with the District Judge that this does not establish a joint venture between Ohio and Painesville Raceway. See Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 589, 596 (3rd Cir. 1979), cert. denied, 446 U.S. 956 (1980).

Painesville Raceway's denial of horse stall space was still the act of Ohio if there was a sufficiently close nexus between Ohio and the eviction. Appellants established that harness racing is a heavily regulated industry. However, the mere fact that a heavily regulated industry evicted appellants does not render the eviction state action where Ohio did not review

the eviction in a detailed manner and give its approval, even if Ohio was aware of and did not disapprove the eviction. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). A state's mere acquiescence in a private act does not convert the act into state action. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164 (1978). Ohio did nothing in this case explicitly to approve or disapprove Painesville's action in terminating appellants' use of stall space. The District Judge correctly found that there was no nexus between Ohio and the eviction insofar as the rental of stall space was concerned.

Appellants rely on the fact that the Third Circuit did find a sufficiently close nexus between the state and a racing company's action in Fitzgerald, supra. In that case a horseman suspected of not giving his best effort was suspended from the track by the racing company. The company suspended the horseman only after it conferred with state officials and notified the horseman of the suspension in front of those state officials. Further, the company was acting to enforce a state racing rule. None of those factors is present in this case, and the Third Circuit emphasized that it was the presence of those factors that led it to find state action. 607 F.2d at 597-599. Thus, even assuming that Fitzgerald was correctly decided, we agree with the District Court that it does not aid appellants in this case.

Accordingly, the judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT