

IN THE
INDIANA COURT OF APPEALS

No. ~~49A02-0305-CV-447~~

49Ac2-C416-CV-523

5-26-05
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MIGUEL VILLEGAS, <i>et al.</i> ,)	Appeal from the Marion Superior Court
)	No. 3
Plaintiffs-Appellants,)	
)	Trial Court No. 49D03-0208-PL-1448
v.)	
)	
JOEL SILVERMAN, <i>et al.</i> ,)	Hon. Patrick L. McCarty, Judge
)	
Defendant-Appellee.)	

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SUMMARY OF THE ARGUMENT

The appellee's (hereinafter "BMV's) only substantive arguments are that the trial court did not err in finding that the named plaintiffs did not have standing and that two of the named plaintiffs were correctly precluded from proceeding in this action because of the clean hands doctrine. The BMV therefore refuses to address the merits of this case even though the trial court did. The standing argument is clearly erroneous and inasmuch as the trial court addressed the merits of this case this Court must also resolve this case on the merits.

The BMV has conceded, and indeed the challenged policy specifically holds, that at the current time it is not necessary for an applicant for a driver's license to possess a Social Security number. Thus, the BMV's argument to this Court asks this Court to disregard the BMV's own interpretation of Indiana law, an interpretation which is "entitled to great weight." *Concerned Citizens of West Boggs Lake v. West Boggs Sewer District, Inc.*, 810 N.E. 2d 720, 723 (Ind.Ct.App. 2004). Therefore, the named plaintiffs are not precluded from bringing this action because they do not have driver's licenses.

Moreover, Indiana law, IND. CODE §§ 9-24-16-1, 2, is clear, and the BMV concedes, that there is no requirement that a Social Security number be presented in order to obtain a state identification card. Given that two of the named plaintiffs have specifically indicated a desire to have a state identification card, they clearly have standing to pursue this claim on behalf of themselves and the certified class of non-citizens. This matter was presented to the trial court and is properly before this Court. This Court, therefore, would not be issuing an advisory opinion if it addresses this argument. *See, e.g., Armstrong v. Federated Mutual Insurance Company*, 785 N.E.2d 284, 294 (Ind.Ct.App. 2003) (Brook, C.J. concurring).

This case cannot be disposed of based on the claim that two of the three named plaintiffs do not have “clean hands.” The wrongs alleged by the BMV, even if true, do not have “an immediate and necessary relation to the matter before the Court.” *Wedgewood Community Association, Inc. v. Nash*, 781 N.E.2d 1172, 1178 (Ind.Ct.App. 2003). It would therefore be inappropriate to bar the two plaintiffs under the clean hands doctrine. In any event, inasmuch as this is a properly certified class action and the BMV only seeks to bar two of the three named plaintiffs under this doctrine, a ruling adverse to the appellants (hereinafter “the non-citizens”) would not preclude the case from going forward.

The trial court resolved this case on the merits and therefore, this case must be decided on the merits even though the BMV determined not to reply to the merits of the non-citizens’ arguments.

Finally, the recently enacted federal REAL ID Act of 2005 (H.R. 1268), does not alter this case. Although this law provides that three years after its enactment federal agencies will not accept state-issued licenses or identification cards unless they are issued in compliance with certain requirements, including proof of Social Security number and lawful presence in the United States, there is no indication yet as to whether Indiana will comply with the law which is optional for the states. At the current time the challenged rule is the only identification policy binding in Indiana and this case should therefore be decided without regard to the new federal law.

ARGUMENT

I. Introduction

The BMV has eschewed replying to the substantive arguments contained in the non-citizens’

brief, instead spending most of its brief arguing that the trial court was correct in holding that none of the appellants' have standing because they fail to possess a Social Security number. There are multiple problems with the argument. First, the trial court did not specifically or solely hold that the named plaintiffs did not have standing because they did not have Social Security numbers, but instead, unlike the BMV in this appeal, addressed the merits of the non-citizens' arguments. Secondly, the BMV itself recognizes that Indiana law does not require that a person have a Social Security number in order to validly possess a license. In any event, it is undisputed that the non-citizens would also like to possess state identification cards for which it is conceded that no Social Security number is required. Rather than respond to the non-citizens' substantive arguments addressed to the unlawfulness of the challenged identification policy, at least as applied to identification cards, the BMV simply argues that the trial court "apparently overlooked" this argument which was fully briefed below and that the case should therefore be remanded to it. The BMV also argues that the trial court correctly found that two of the three named plaintiffs did not have "clean hands." This is both incorrect and irrelevant inasmuch as this is a certified class action and the BMV apparently concedes that one of the named plaintiffs possesses "clean hands."

Therefore, the BMV's arguments are incorrect. Even though the BMV has chosen not to address the merits of this case, this Court must do so. Moreover, the recent passage of the REAL ID Act of 2005 (H.R. 1268) does not alter the strength of the non-citizens' arguments and the trial court's decision must be reversed.

II. The trial court did not specifically or solely hold that the named plaintiffs did not possess standing because they did not have Social Security numbers

The crux of the BMV's argument is simple. "The Marion Superior Court correctly

determined that the named plaintiffs are without standing to prosecute the lawsuit with respect to driver's licenses because they do not have valid social security numbers . . ." (Appellee's Brief at 14). However, the trial court did not specifically hold this and, more importantly, did not solely base its decision on a standing determination.

A review of the trial court's Conclusions of Law (Appellant' Appendix ["A.A."] at 15-17, discloses that the trial court discussed standing (Conclusion of Law ¶2, A.A. at 15), although it never specifically held that the named plaintiffs did not have standing because they failed to have Social Security numbers. To the extent that the trial court's decision could be construed to have so held, the non-citizens addressed this in their initial brief. (Appellants' Brief at 17-18). However, it is clear that regardless of the standing issue, the trial court proceeded, unlike the BMV in its brief, to address the merits of the non-citizens' arguments. The trial court held that the challenged rule was supported by a valid state interest and by state law (Conclusion of Law ¶¶ 7, 11-12, A.A. at 16-17) and that it did not violate equal protection. (Conclusion of Law ¶¶ 8-9, A.A. at 16).

It is therefore clear that the trial court's decision is not based solely on the fact that the non-citizens do not have standing because they do not possess Social Security numbers. Therefore, both the standing question and the merits of the non-citizens' arguments must be addressed.

III. It is clear, and conceded by the BMV itself, that under current Indiana law a person does not have to have a Social Security number in order to obtain a license

The BMV makes the surprising argument in its brief that Indiana law requires that a person possess a Social Security number in order to obtain a license. The argument is surprising because not only does current Indiana law not so hold, but the BMV itself in this case and in its public pronouncements, recognizes this.

Indiana Code § 9-24-9-2 states that “[e]ach application for a license or permit under this chapter must require the following information: (1) The name, date of birth, sex, Social Security number, and mailing address and, if different from the mailing address, the residence address of the applicant.” Nowhere does this statute explain what should occur if the individual has no Social Security number or, for that matter, if the individual is homeless and has no residence. While the answer to the latter question is not clear from the record, the answer to the former question is clear. The challenged rule here specifically provides that a person who has never been issued a Social Security number may satisfy the Social Security number verification requirement by signing a “BMV Social Security Affidavit.” (Driver License Identification Requirements - Attachment 2 to Plaintiffs’ Motion For Summary Judgment, A.A. at 390).¹ Indeed, the BMV has a policy and procedure manual which not only provides that if an applicant for a license does not have a Social Security number, he or she may execute an affidavit, but which also provides a method for someone who has a false Social Security number on file to have that number removed and then to sign an affidavit so that a license can be obtained. Thus the BMV’s Policy and Procedure for the General Acceptance of Social Security Number documentation required for BMV transactions (Ex. 9 to Deposition of Karen Cothron, Attachment I to Plaintiffs’ Motion for Summary Judgment, [“Cothron Deposition”] at 384-85), states:

FOR DRIVER LICENSE AND PERMIT TRANSACTIONS ONLY:

¹ Although outside of the record of this case, this Court can take notice of the fact that the BMV’s website continues to indicate that Social Security number verification can be satisfied by an applicant executing an affidavit which attests that the applicant has never been issued a Social Security number. See, “Driver License - Identification Requirements,” www.in.gov/bmv/driverlicense/ldreq.html (accessed on May 13, 2005).

If a driver license or permit applicant does not have or has never been issued a Social Security number (and there is no SSN on file for the applicant), the CSR² will inform the applicant that he or she must complete and sign an affidavit, under penalty of perjury, stating that the applicant does not have a social security number. If the applicant completes and signs the affidavit, then the CSR will enter (NOSSN) in the social security number field on the application. These letters stand for No Social Security Number. The system will then prompt "Affidavit Required". The affidavit should be attached to the application and forwarded to Driver Services, Document Control Section to be made part of the driving record.

If the applicant indicates that he or she does not have or has never been issued a social security number but it appears that the BMV record has a social security number on file for the applicant, the original letter of "no record" found from the SSA will be required. Once the applicant presents a letter from the SSA of "no record" (and the BMV record shows a SSN # on file), Driver Services should be contacted to remove SS# from the BMV file. Once the SSN is removed from the BMV file by Driver Services, and after the affidavit is completed and signed by the applicant, the CSR will then be able to complete the transaction by entering "NO SSN" into the appropriate field, The CSR should attach the letter of "no record" from the SSA and the affidavit to the application to be forwarded to Driver Services.

Karen Cothron, the designate for the BMV in this case, testified as follows:

Q. Okay. Now the policy here, referring to the current policy, requires that you have proof of a Social Security Number; is that correct?

A. That is correct.

Q. But if you've never been issued a Social Security Number, you can do an affidavit; is that correct?

A. That is correct.

(Cothron Deposition at 5, 12, A.A. at 80, 82).

² "CSR" stands for the BMV's "Customer Service Representative". (Cothron Deposition at 36).

In the wake of this the BMV argues in its brief that the agency's interpretation of Indiana law is "misplaced" because the BMV's interpretation does not overrule state law. (Appellee's Brief at 18). Thus, the BMV is making the unique argument that its own interpretation of the law is unlawful. Given this odd argument, it is therefore not surprising that the non-citizens must point out the law which state agencies frequently cite, namely that "[w]hile the interpretation of a statute is a question of law for the courts, the interpretation given to statutes . . . by an administrative agency charged with the duty of enforcing those statutes . . . is entitled to great weight." *Concerned Citizens of West Boggs Lake*, 810 N.E.2d at 723. This is certainly a reasonable and proper interpretation and, given that the BMV fully concedes that persons without Social Security numbers can obtain licenses and indeed has procedures designed to effectuate this, it is clear that the named plaintiffs could receive licenses even though they do not possess Social Security numbers.

IV. The named plaintiffs have standing to bring this action

A. The named plaintiffs have standing to seek driver licenses

The BMV argues that the named plaintiffs do not have standing to challenge the identification rule insofar as it involves obtaining a driver's license because they do not have a Social Security number. However, as indicated above this is clearly erroneous since the BMV recognizes that an applicant may receive a license even if he or she does not have a driver's license. The named plaintiffs are currently unable to receive a license not because they do not have a Social Security number, but because they are unable to meet the requirements of the challenged identification policy. They are therefore suffering concrete and direct injury because of the challenged rule and standing is present. *See, e.g., Schulz v. State*, 731 N.E.2d 1041, 1044 (Ind.Ct.App. 2000).

This resolves any standing problem that named plaintiffs' Doe and Smith might have.

However, the BMV argues that plaintiff Villegas is ineligible for a license because he is currently suspended from driving pending demonstrating completion of a driver improvement course. (Appellee's Brief at 15, n. 4)³. These conditions are easily remedied and, at that point, Mr. Villegas will continue to be barred from obtaining a license because he does not have the appropriate documentation. This future injury is not conjectural, but is concrete and therefore it satisfies the requirement that standing be supported by an injury in fact. *See, e.g., Delta Water Agency v. United States*, 306 F.3d 938, 947-48 (9th Cir. 2002).

- B. Regardless of any issue concerning a driver's license, plaintiff Villegas and plaintiff Smith have standing inasmuch as they desire to obtain state identification cards for which there is no requirement that a Social Security number be disclosed and this issue was presented and ruled upon by the trial court

It is clear that Indiana law does not require that a person applying for a state identification card present evidence that he or she has a Social Security number. IND. CODE §§ 9-24-16-1, 2. The BMV itself concedes that there is no requirement that persons seeking identification cards present their Social Security number. (Cothron Deposition at 14-15, A.A. at 83). Both Mr. Villegas and Ms. Smith specifically indicated that they wished to obtain identification cards. (*See* Affidavit of Jose Miguel Villegas ¶¶ 5, 10, A.A. at 38; Affidavit of Mary Smith ¶10, A.A. at 44). The non-citizens pointed out to the trial court that persons who seek identification cards do not need to present documentation of a Social Security number (*See*, Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment of March 29, 2004 at 5, n. 6, contained in Appellants' Supplemental

³ The BMV also argues that Mr. Villegas is suspended currently for failure to demonstrate insurance. (*Id.*). However, it appears that the suspension for driving without insurance expired on February 16, 2004. (Exhibit C to Defendant's Motion for Summary Judgment, A.A at 250). The only thing which is still current is the suspension for failing to comply with DDC, which appears to be a defensive driving course. *See*, IND. CODE § 9-30-3-12.

Appendix filed on this date at 2). And, once an issue of standing was raised, the plaintiffs argued to the trial court that as persons seeking identification cards they had standing regardless of whether or not they could seek licenses. (Plaintiffs' Reply Memorandum in Support of their Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment of May 17, 2005 at 1-5, Supplemental Appendix at 5-9).

The BMV does not deny that this issue was raised before the trial court. However, it claims that the trial court apparently "overlooked" the fact that a Social Security number is not necessary to obtain an identification card and that, therefore, it would be an "advisory opinion" for this Court to consider the issue at this point. (Appellee's Brief at 22). This is erroneous.

It is clear from the trial court's decision that it considered the non-citizens' arguments on the merits and found that the challenged new identification policy did not violate either the Constitution or Indiana law. (Conclusions of Law ¶¶ 7-12, A.A. at 16-17). Of course, the trial court's findings do not bind this Court on a review of a summary judgment determination on a pure issue of law. See e.g., *KLLM v. Legg*, 826 N.E.2d 136, 140 (Ind.Ct.App. 2005). The matter is reviewed *de novo*. *Id.* Therefore, the trial court's specific findings are not relevant. The only concern here would be if the matter had not been litigated in the trial court. For, "[i]t is well-settled that a party cannot argue on appeal an issue which was not properly presented to the trial court. When an issue is not presented before the trial court, appellate review of that issue is waived.' . . . This court does not and should not issue advisory opinions." *Armstrong*, 785 N.E.2d at 294 (Brook, C.J., concurring).

The trial court had before it the argument that regardless of the need of a Social Security number to obtain a license, none is needed to obtain a state identification card. The trial court ruled

against the non-citizens on the merits, therefore ruling against the non-citizens on this issue as well. This issue is therefore squarely and properly before this Court on appeal.

V. This case can not be disposed of based on the clean hands doctrine

The BMV argues that even if the named plaintiffs have standing, the trial court nevertheless properly held that Ms. Doe and Ms. Smith should be barred from proceeding to seek equitable relief because of their failure to have “clean hands.” As an initial matter, the relevance of this argument is not clear. Even if Ms. Doe and Ms. Smith are barred from serving as named plaintiffs in this certified class action, no argument is made that Mr. Villegas should be barred. Therefore, even if Ms. Doe and Ms. Smith were to be dismissed, this action would proceed through Mr. Villegas on behalf of the certified class.

However, it is clear that the clean hands argument is erroneous. In order for the clean hands doctrine to apply, the “wrong that is ordinarily invoked to defeat a claimant by using the . . . doctrine must have an immediate and necessary relation to the matter before the court.” *Wedgewood Community Association*, 781 N.E.2d at 1178 (internal citations and quotation marks omitted). Although Ms. Smith asserted her privilege under the Fifth Amendment to the United States Constitution and refused to answer as to whether she gave a Social Security number when she applied for employment, there is absolutely no evidence that Ms. Smith ever relied on a false Social Security number in attempting to establish an identity. Moreover, she has never had a license, permit or state identification card because she was unable to procure an identification card because of the challenged rule. (Affidavit of Mary Smith, ¶¶ 7-10, A.A., at 44.) Given this, it is difficult to see how Ms. Smith’s alleged use or not of an inaccurate Social Security number has an immediate relation to this issue here; the validity of the rule. This is particularly true inasmuch as the BMV in its

practices, as indicated above, not only concedes that a Social Security number is not necessary to obtain a license or permit, but it also provides a method for a person who has used a false Social Security number to nevertheless obtain a license. Given that the BMV itself has determined that a person without a Social Security number is not barred from receiving a license even when “it appears that the BMV record has a social security number on file for the applicant” (Ex. 9 to Cothron Deposition at 384-85), the use of a false Social Security number does not allow for the use of the clean hands doctrine.⁴

Similarly, even if Ms. Doe used an inaccurate Social Security number, which is certainly not conceded or proven, it simply is not material to the matter before this Court, whether the underlying policy is unlawful and unconstitutional. Ms. Doe is not being denied a license or identification card because she does not have a valid Social Security number because it is clear under current Indiana law that a Social Security number is not necessary to obtain a license or identification card. She is being denied because of the challenged policy. The clean hands doctrine does not bar this challenge.

VI. This case should therefore be decided on the merits

After making its standing and clean hands arguments in its brief the BMV stops and states that inasmuch as the named plaintiffs did not have standing this Court should proceed no further. Of course, as is demonstrated above, the named plaintiffs certainly have standing and this Court should, and must, proceed to the merits of the case. The fact that the BMV has chosen not to address the merits certainly does not preclude this Court from doing so.

An appellee’s failure to respond to an issue raised by an appellant is akin to failure to file a brief . . . This circumstance does not, however,

⁴ And, of course, under current Indiana law, a person applying for an identification card is not asked for a Social Security number.

relieve us of our obligation to decide the law as applied to the facts in the record in order to determine whether reversal is required. . . . Controverting arguments advanced for reversal is still an obligation which properly remains with counsel for the appellee . . . Therefore, . . . [appellant] need only establish that the lower court committed prima facie error to win reversal on this issue.

Newman v. State, 719 N.E.2d 832, 838 (Ind.Ct.App. 1999). For the reasons indicated in their opening brief, the non-citizens are entitled to reversal of the trial court's decision and are further entitled to summary judgment.

VII. The newly enacted REAL ID Act of 2005 does not preclude this Court from reversing the trial court and entering judgment for the non-citizens

On May 11, 2005, President Bush signed into law the REAL ID Act of 2005 as Division B to H.R. 1268, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005. (<http://thomas.loc.gov/cgi-bin/query/F?c109:6:/temp/~c10966b5zA:e238497/>) [accessed on May 16, 2005]; ("Statement on H.R. 1268," <http://www.whitehouse.gov/news/releases/2005/05/20050511-5.html> [accessed May 16, 2005] (Appellant's Addendum at 8).. Title II of the statute specifically concerns "Improved Security for Drivers' Licenses and Personal Identification Cards." (Appellant's Addendum at 1). It provides that beginning three years after enactment of the Act, a federal agency will not accept a state-issued driver's license or identification card unless the state meets the Act's requirements. Section 202 (a). These requirements include the person's Social Security number or proof that the person is not eligible for a Social Security number, Sec. 202 (c)(1)(C) and proof that the person is lawfully in the United States. Sec. 202 (c)(2)(B).⁵ Additionally, no later than September 11, 2005,

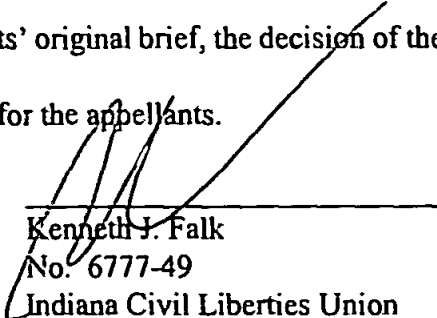
⁵ Among those who are deemed by the REAL ID Act to be lawfully in the United States are those who have pending applications for asylum or pending applications for temporary protected status or adjustment of status. Sec. 202 (c)(2)(C). These persons may not be able to

participating states are to enter into a memorandum of understanding with the Secretary of Homeland Security to use an automated system set up by the federal government to verify the legal presence status of persons, other than United States citizens, who apply for licenses or identification cards. Sec. 202(c)(3)(C).

It is clear that a state may choose not to comply with the Act and if it chooses to do so it has three years to comply. In order for Indiana to comply it will have to change Indiana law to conform to the requirements of the Act. It is premature to speculate as to what the General Assembly will do in this matter and at the current time the law regulating identification and the obtaining of licenses and state identification cards in Indiana is the challenged policy, not the REAL ID Act. And, the challenged policy is both unlawful and unconstitutional.

CONCLUSION

For the foregoing reasons, and those in the appellants' original brief, the decision of the trial court should be reversed and judgment should be entered for the appellants.



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receive licenses or identification cards under the challenged policy. (See, Affidavit of Attorney Thomas Ruge ¶ 17, Attachment 4 to Plaintiffs' Motion for Summary Judgment, A.A. pp. 225-226.)

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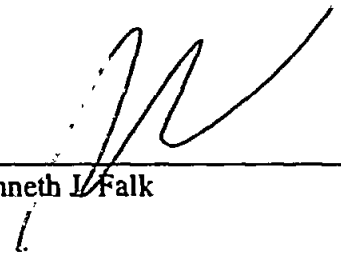
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the below person(s) by first class U.S. postage, pre-paid, on the 20th day of May, 2005

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