

TEXAS COURT OF APPEALS, THIRD DISTRICT AT AUSTIN

Save Our Springs Alliance, Inc. v. City of Dripping Springs; Todd Purcell, in His Official Capacity as Mayor of the City of Dripping Springs; and Mak Foster Ranch, L.P.

No. 03-04-00683-CV · No. No. 03-04-00683-CV · Decided February 12, 2010

SUMMARY

This dissenting opinion argues that en banc reconsideration was warranted because the panel’s decision allegedly conflicted with Texas precedent concerning associational standing to assert members’ environmental, recreational, and scientific interests. Justice Patterson contends that standing does not require a member to possess an affected vested property interest and would have granted Save Our Springs Alliance’s motion for en banc reconsideration.

CASE DETAILS

COURT	Texas Court of Appeals, Third District at Austin
WRITING FOR THE COURT	Jan P. Patterson; Chief Justice Jones; Justice Patterson; Justice Puryear; Justice Pemberton; Justice Waldrop; Justice Henson
JURISDICTION	Texas
DECIDED	February 12, 2010
DOCKET	No. 03-04-00683-CV
DISPOSITION	other
PROCEDURAL POSTURE	Save Our Springs Alliance moved for en banc reconsideration of a two-justice panel decision concerning its standing to pursue environmental, recreational, and scientific injury claims on behalf of its members. This dissent disagrees with the denial of en banc reconsideration.
STANDARD OF REVIEW	En banc reconsideration is warranted under Texas Rule of Appellate Procedure 41.2(c) to secure or maintain uniformity of the court's decisions.
PRECEDENTIAL VALUE	Published dissenting opinion; the dissent's proposed standing rule is nonbinding.
PARTIES	Save Our Springs Alliance, Inc. v. City of Dripping Springs, Todd Purcell, in his Official Capacity as Mayor of the City of Dripping

TOPICS

standing

environmental law

municipal law

appellate procedure

motion for reconsideration

PRACTICE AREAS

Environmental law

Civil procedure

Municipal law

Appellate procedure

QUESTIONS PRESENTED

1. Whether en banc reconsideration was warranted because the panel's standing rule conflicted with the court's prior decisions.
2. Whether an association seeking to assert its members' environmental, recreational, or scientific injury must show that a member has a vested or other property interest affected by the challenged governmental action.

HOLDINGS

1. The dissent would grant Save Our Springs Alliance's motion for en banc reconsideration because the panel's decision conflicted with the court's jurisprudence concerning associational standing and environmental injury.
2. The dissent would reject a categorical requirement that an association show that one of its members has an affected property interest; recreational, aesthetic, scientific, or environmental injury may constitute injury in fact when sufficiently concrete and particularized.

KEY QUOTATIONS

“An injury need not affect “vested” property rights to confer standing” (at 1)

“the harm [for purposes of standing] may be economic, recreational, or environmental.” (at 1)

“While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice.” (at 3)

FACTUAL BACKGROUND

Save Our Springs Alliance, an environmental association, asserted claims based on alleged environmental, recreational, and scientific harm to its members involving public land and actions by the City of Dripping Springs and related appellees. The panel concluded that, absent a statute conferring standing, the association had to show that one of its members possessed a property interest affected by the appellees' actions. The dissent argued that the alleged injuries could support standing even without an affected vested property interest.

PROCEDURAL HISTORY

The case arose from the District Court of Hays County, 207th Judicial District, cause number 02-1748. After a two-justice panel issued a decision requiring the association to show that one of its members had an affected property interest, the association sought en banc reconsideration. The court denied that motion, and Justice Patterson dissented, joined by Justice Henson.

DISPOSITION

other

CASES CITED

- Texas Rivers Prot. Ass'n v. Texas Natural Res. Conservation Comm'n, 910 S.W.2d 147, 151-52 (Tex. App.—Austin 1995, writ denied)
- Coastal Habitat Alliance v. Public Util. Comm'n, 294 S.W.3d 276, 287 (Tex. App.—Austin 2009, no pet.)
- Walker v. City of Georgetown, 86 S.W.3d 249, 253 (Tex. App.—Austin 2002, pet. denied)
- Lindig v. City of Johnson City, No. 03-08-00574-CV, 2009 Tex. App. LEXIS 8188, at *19-20 (Tex. App.—Austin Oct. 21, 2009, no pet.)
- Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 562-63, 564, 568 (1992)
- Nobles v. Marcus, 533 S.W.2d 923, 927 (Tex. 1976)
- Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149, 1152-53 (2009)
- Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183 (2000)
- Sierra Club v. Morton, 405 U.S. 727, 735 (1972)
- Bennett v. Spear, 520 U.S. 154, 167 (1997)
- Cantrell v. City of Long Beach, 241 F.3d 674, 681 (9th Cir. 2001)

OPINION

PER CURIAM.

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN ON MOTION FOR RECONSIDERATION EN BANC NO. 03-04-00683-CV Save Our Springs Alliance, Inc., Appellant v. City of Dripping Springs; Todd Purcell, in his Official Capacity as Mayor of the City of Dripping Springs; and Mak Foster Ranch, L.P., Appellees FROM THE DISTRICT COURT OF HAYS COUNTY, 207TH JUDICIAL DISTRICT NO. 02-1748, HONORABLE JACK H. ROBISON, JUDGE PRESIDING DISSENTING OPINION Review en banc is warranted to “secure or maintain uniformity” of this Court’s decisions.

See Tex. R. App. P. 41.2(c). Because the two-justice panel’s decision is inconsistent with this Court’s jurisprudence in an important and recurring area of law—an association’s standing to pursue its member’s claims of environmental harm—I respectfully dissent from the denial of appellant’s motion for en banc reconsideration.

The panel holds that, in the absence of a statute conferring standing, appellant Save Our Springs Alliance, Inc. (“SOS Alliance”) was required to show that one of its members had a property interest affected by appellees’ actions.

The panel’s holding, narrowing the class of claimants with common law standing to assert recreational, scientific, and environmental harm, conflicts with other opinions of this Court. See *Texas Rivers Prot. Ass’n v. Texas Natural Res. Conservation Comm’n*, 910 S.W.2d 147, 151-52 (Tex. App.—Austin 1995, writ denied).

In *Texas Rivers Protection Association*, this Court held that “[a]n injury need not affect ‘vested’ property rights to confer standing” and that “the harm [for purposes of standing] may be economic, recreational, or environmental.” See *id.*; see also *Coastal Habitat Alliance v. Public Util. Comm’n*, 294 S.W.3d 276, 287 (Tex. App.—Austin 2009, no pet.) (recognizing this Court’s holding in *Texas Rivers Protection Association* that “[a]n injury need not affect ‘vested’ property rights to confer standing” and, thus, “the harm [for purposes of standing] may be economic, recreational, or environmental”)¹; *Walker v. City of Georgetown*, 86 S.W.3d 249, 253 (Tex.

App.—Austin 2002, pet. denied) (common law rule for standing to enjoin actions of governmental body satisfied if “the challenged action has caused the plaintiff some injury in fact, either economic, recreational, environmental, or otherwise”); *Lindig v. City of Johnson City*, No. 03-08-00574-CV, 2009 Tex. App. LEXIS 8188, at *19-20 (Tex. App.—Austin Oct. 21, 2009, no pet.) (op. on reh’g) (citing common law rule for standing in *Walker*).

The panel cites *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and *Nobles v. Marcus*, 533 S.W.2d 923, 927 (Tex. 1976), to support its holding that SOS Alliance was required to show that one of its members had an affected property interest to have standing. Neither case, ¹ In *Coastal Habitat Alliance*, this Court also cites *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir.

2001) (“That the litigant’s interest [for purposes of standing] must be greater than that of the public at large does not imply that the interest must be a substantive right sounding in property or contract.”), to support its conclusion that “[w]hether a plaintiff has standing in federal courts to assert a cause of action is not indicative of the deprivation of a vested property right.” *Coastal Habitat Alliance v. Public Util.*

Comm’n, 294 S.W.3d 276, 287 (Tex. App.—Austin 2009, no pet.). ² However, supports curtailing common law standing here. That a party does not have standing to assert a fraud claim when he was not the defrauded party is not analogous to SOS Alliance’s alleged injury to its members’ environmental, recreational, and scientific interests in public land. See *Nobles*, 533 S.W.2d at 927.

As to *Lujan*, the panel cites the Supreme Court’s definition of “injury in fact.” See 504 U.S. at 560. In the context of standing under Article III of the United States Constitution, the Supreme

Court defined “injury in fact” as “an invasion of a legally protected interest which is... concrete and particularized” and “actual or imminent.” Id. (citation omitted); see also U.S. Const. art. III.

The panel focuses on the Supreme Court’s requirement that the interest be “legally protected,” but the Supreme Court did not purport to restrict standing to property owners affected by the challenged action there. In that case, environmental associations on behalf of their members challenged a rule promulgated by the Secretary of the Interior concerning certain funded activities abroad that allegedly increased the rate of extinction of endangered and threatened species.

Lujan, 504 U.S. at 562. Although the Supreme Court concluded that the associations failed to show injury in fact to have standing to seek judicial review of the rule, the Supreme Court recognized that, “[o]f course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.” Id. at 562-63.

The Supreme Court denied associational standing, not because a member did not have a property interest, but because the associations failed to demonstrate redressability and “actual or imminent” injury—i.e., that a member had “concrete plans” to visit an area affected by the rule. Id. at 564, 568. 3 The Supreme Court more recently addressed injury in fact in the context of allegations of environmental harm to the national forests: It is common ground that the respondent organizations can assert the standing of their members.

To establish the concrete and particularized injury that standing requires, respondents point to their members’ recreational interests in the National Forests. While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice.

See *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009); see also *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)) (“We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.”); *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (defining injury in fact as “an invasion of a judicially cognizable interest”).

Consistent with its decision in *Lujan*, the Supreme Court denied standing to challenge the regulations at issue because there was no live dispute over a concrete application of the regulations, not because the organizations failed to show a property interest by their members to confer standing. 129 S. Ct. at 1152-53.2 This Court’s holding in *Texas Rivers Protection Association* that “an injury need not affect ‘vested’ property rights to confer standing” conforms with federal case law concerning 2 In *Summers*, the government conceded that affidavits that a member had “repeatedly visited” a particular public site, that he had “imminent plans to do so

again,” and that “his interests in viewing the flora and fauna of the area” would be harmed were sufficient to establish standing under Article III.

Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149 (2009). 4 standing under Article III. See Summers, 129 S. Ct. at 1149; Lujan, 504 U.S. at 562-63; Texas Rivers Prot. Ass’n, 910 S.W.2d at 151-52. The panel’s holding to the contrary here should not be sustained in the absence of review en banc. See Tex. R. App. P. 41.2(c).

Because the panel’s decision is inconsistent with this Court’s jurisprudence in an important and recurring area, I would grant appellant SOS Alliance’s motion for en banc reconsideration.³ Jan P. Patterson, Justice Before Chief Justice Jones, Justices Patterson, Puryear, Pemberton, Waldrop and Henson Joined by Justice Henson Filed: February 12, 2010 3 Because I believe review en banc is warranted based upon the standing issue, I limit my review to this ground.