

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000342-OA

COMMONWEALTH OF KENTUCKY,
ENERGY AND ENVIRONMENT CABINET

PETITIONER

v. AN ORIGINAL ACTION
ARISING FROM FRANKLIN CIRCUIT COURT
ACTION NOS. 10-CI-01967 & 10-CI-01868

HONORABLE PHILLIP J. SHEPHERD,
JUDGE, FRANKLIN CIRCUIT COURT

RESPONDENT

AND

APPALACHIAN VOICES, INC., ET AL

REAL PARTIES IN INTEREST

AND

NO. 2011-CA-000343-OA

FRASURE CREEK MINING, LLC

PETITIONER

AN ORIGINAL ACTION
ARISING FROM FRANKLIN CIRCUIT COURT
ACTION NOS. 10-CI-01867 & 10-CI-01868

HONORABLE PHILLIP J. SHEPHERD,
JUDGE, FRANKLIN CIRCUIT COURT

RESPONDENT

AND

APPALACHIAN VOICES, INC., ET AL

REAL PARTIES IN INTEREST

ORDER

- 1) DENYING PETITIONS FOR WRITS OF PROHIBITION AND MANDAMUS; and
- 2) DENYING MOTION FOR INTERMEDIATE RELIEF AS MOOT

** * * * *

BEFORE: ACREE, DIXON, AND WINE, JUDGES.

These companion petitions for writs of prohibition and mandamus seek to prohibit the enforcement of an order which granted the motion of Appalachian Voices, and others,¹ to intervene in a judicial enforcement action prosecuted by the Cabinet for Energy and Environment. The trial court also granted the intervenors an abbreviated period of limited discovery. Petitioners in each action allege that the Franklin Circuit Court acted outside its jurisdiction in permitting intervention because KRS Chapter 224 does not provide for citizen participation. They also argue that to allow intervention in this case impinges upon the orderly administration of justice in the Commonwealth. Having considered the petitions of the Cabinet and Frasure Mining for writs of prohibition and mandamus, the responses of the real parties in interest, and being

¹ The real parties in interest who sought to intervene below are Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentuckians for the Commonwealth, Inc., Kentucky Riverkeeper, Inc., Pat Banks, Lanny Evans, Thomas H. Bonny, and Winston Merrill Combs. For convenience, these parties will be addressed as "Appalachian Voices."

otherwise sufficiently advised, the Court ORDERS that the petitions be, and they are hereby, DENIED.

The facts underpinning the petitions are straightforward and undisputed. In October, 2010, real party in interest Appalachian Voices served upon Frasure Creek Mining, ICG Hazard, LLC, and ICG Knott County, LLC, notices of intent to sue for alleged violations of the federal Clean Water Act. As required by 33 U.S.C. §1365 of the Act, the notices were also provided to the Administrator of the United States Environmental Protection Agency and the Secretary of the Kentucky Energy and Environmental Cabinet concerning the alleged violations of the federal act and its state counterpart which is set out in KRS Chapter 224 and accompanying regulations.

Pursuant to 33 U.S.C. §1365(b), the notice letters triggered a 60-day period during which the EPA and the Cabinet, as well as the U.S. and Kentucky Attorneys General, could investigate the alleged claims and bring enforcement actions. As Appalachian Voices notes, the enforcement actions, if diligently prosecuted, would preclude citizens and groups from pursuing their claims against the alleged violators. On December 3, 2010, at the end of the investigatory period, the Cabinet filed complaints in the Franklin Circuit Court asserting some of the violations alleged by Appalachian Voices, as well as pursuing additional violations the Cabinet uncovered during the 60-day investigatory period.

In addition to filing the complaints, the Cabinet simultaneously filed proposed consent judgments it had negotiated with the coal companies. One week later, the Cabinet and the coal companies filed a joint motion to enter the consent judgments. It

was at that point that Appalachian Voices sought to intervene in the action filed by the Cabinet. After giving the parties an opportunity to fully brief the intervention issue and conducting oral argument, the circuit court granted the motion to intervene but held the intervening complaint in abeyance pending the court's review of the of the joint motion to enter the consent decree and the intervening complaint. The circuit court also permitted the intervenors a period of 90 days to conduct initial discovery into the issue of whether the proposed consent decrees are "fair, adequate, reasonable, and consistent with the public interest."

Upon entry of that order, petitioners filed the instant applications for a writ prohibiting enforcement of the order and seeking emergency relief in the form of a stay of discovery pending resolution of the writ. In denying the request for emergency relief, this Court noted that petitioners had failed to demonstrate that the prospect of having to participate in discovery constituted irreparable injury during the relatively short period that their underlying writs were pending.

With this background in mind, we turn to the merits of the petitions for writs of prohibition and mandamus. To prevail on petitions for extraordinary relief, petitioners bear the substantial burden of demonstrating a) that the circuit court is proceeding or is about to proceed outside or in excess of its jurisdiction; or b) that it is proceeding erroneously within its jurisdiction for which the petitioners have no adequate remedy by appeal or otherwise and that great and irreparable injury will result unless the petition is granted. *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004).

Initially, petitioners insist that the Franklin Circuit Court acted without

jurisdiction in permitting Appalachian Voices to intervene in the action the Cabinet filed in that forum. We disagree.

Although petitioners correctly cite the *Hoskins* criteria for obtaining relief by writ, they appear to misapprehend the nature of “jurisdiction” as that term relates to the extraordinary remedies of mandamus and prohibition and as it was applied in *Hoskins*. In *Petrey v. Cain*, 987 S.W.2d 786 (Ky. 1999), the Kentucky Supreme Court explained that the proper interpretation of “jurisdiction” with respect to original actions means **subject matter jurisdiction**:

An inferior court's jurisdiction within the meaning of the rules applicable to prohibition connotes subject matter jurisdiction. *Preston v. Meigs*, Ky., 464 S.W.2d 271, 275 (1971). **Ordinarily, “subject matter jurisdiction” refers to a court's authority to determine “this kind of case” as opposed to “this case.”**

987 S.W.2d at 788 (emphasis added.)

Similarly, in *Doe v. Potter*, 225 S.W.3d 395 (Ky.App. 2006), this

Court held that:

In the context of a petition for a writ of prohibition under CR 76.36, jurisdiction connotes “subject matter jurisdiction.” *Petrey v. Cain*, 987 S.W.2d 786, 788 (Ky.1999); *Preston v. Meigs*, 464 S.W.2d 271, 275 (Ky.1971). There is no question that the underlying action, *John Doe v. Roman Catholic Diocese of Covington*, is within the subject matter jurisdiction of the circuit court. Moreover, the case remains active on the Boone Circuit Court docket and the trial judge has expressly retained jurisdiction to supervise and implement the settlement. Senior Judge Potter clearly

did not act outside his jurisdiction in issuing the *sua sponte* order.

225 S.W.3d at 399-400.

The primary flaw in petitioners' jurisdictional argument is the apparent confusion between subject matter jurisdiction and standing. Clearly, the Franklin Circuit Court obtained subject matter jurisdiction over the controversy between the Cabinet and the coal companies when the Cabinet lodged its enforcement action in that forum. And, once its subject matter jurisdiction was properly invoked, the circuit court had inherent authority under CR 24.01 to rule upon Appalachian Voices' motion to intervene. Whether Appalachian Voices had standing to intervene as a party under federal law and our statutory scheme calls into question **only** the propriety of the circuit court's decision on the motion, **not** its jurisdiction to resolve the motion in the first place. Were we to conclude otherwise, jurisdictional issues would arise with every potentially erroneous interpretation of a statute and this Court would face "an impossible burden of non-appellate matters" in resolving purely interlocutory orders. *See, Bender v. Eaton*, 343 S.W.2d 799, 800 (Ky. 1961).

Based upon this analysis, we conclude that the circuit court acted within its subject matter jurisdiction. We therefore turn our attention to whether petitioners can pass the second test for obtaining extraordinary relief – that they lack an adequate remedy by appeal and, if they can meet that burden, whether

irreparable injury or a substantial miscarriage of justice is likely to ensue. We conclude that petitioners have failed to satisfy either criterion.

Questions concerning a party's standing to sue are routinely disposed of by direct appeal. *See*, for example, *Ashland v. Ashland F.O.P. # 3*, 888 S.W.2d 667, 668 (Ky.1994); *Sierra Club v. Morton*, 405 U.S. 727, 731, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972)("Standing to sue" means that a party has "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy...."); *Flast v. Cohen*, 392 U.S. 83, 99–100, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968) ("The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a ... court and not on the issues he wishes to have adjudicated.... In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and **not whether the issue itself is justiciable.**")(emphasis added); *Kraus v. Kentucky State Senate*, 872 S.W.2d 433, 439 (Ky.1993); and *Stevens v. Stevens*, 798 S.W.2d 136, 139 (Ky.1990). In each of these cases, the question of whether a party had standing to proceed was decided on direct appeal.

We find the analysis of standing set out by the United States Supreme Court in *Flast* particularly *apropos* to the issues advanced in these petitions:

The various rules of standing applied by federal courts have not been developed in the abstract. Rather, they have been fashioned with

specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated. **We have noted that, in deciding the question of standing, it is not relevant that the substantive issues in the litigation might be nonjusticiable.** However, our decisions establish that, in ruling on standing, it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated.

392 U.S. at 101-02(emphasis added.) In light of this well-established precedent, we are persuaded that petitioners in this case do, in fact, have an adequate remedy by appeal of any potential error in the circuit court's decision that Appalachian Voices had standing to inject themselves into the enforcement action.

Having concluded that petitioners have an adequate appellate remedy, our analysis could end at this point. However, because petitioners argue that the intervention order implicates the "orderly administration of justice" in the Commonwealth and impinges upon their right to settle their differences through negotiation, we will briefly address those issues.

In *Cox v. Braden*, 266 S.W.3d 792 (Ky. 2008), the Kentucky Supreme Court emphasized that the second class of writs includes a "very limited" exception to the requirement of demonstrating great and irreparable harm, the so-called "certain special cases exception:"

This second "class" of writs includes a very limited exception wherein the showing of great and irreparable harm "is not an absolute prerequisite" for the issuance of a writ (though the requirement of a lack of an adequate remedy by appeal remains). *Hoskins*, 150 S.W.3d

at 10. The great and irreparable harm requirement may be put aside in “certain special cases ... [where] a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration. **It may be observed that in such a situation the court is recognizing that if it fails to act the administration of justice generally will suffer the great and irreparable injury.**” *Bender*, 343 S.W.2d at 801.

266 S.W.3d at 797(emphasis added.) The order allowing intervention in this case does not even approach that level. Review of the pleadings makes clear that petitioners are alleging a uniquely personal injury—that they being forced to litigate the enforcement action with parties whom they allege have no right to dispute the fairness of the proposed consent decree. Thus, the orderly administration of justice generally is not at stake in the underlying action.

Furthermore, as to interference with the right to settle disputes through negotiation and compromise, again, neither the orderly administration of justice nor immediate and irreparable injury is implicated. The Supreme Court has repeatedly instructed that “the prospect of preparing for and defending at trial does not constitute irreparable injury for which the extraordinary remedies of mandamus and prohibition will lie.” *Estate of Cline v. Weddle*, 250 S.W.3d 330, 335 (Ky. 2008). Both *Weddle* and the Supreme Court’s opinion in *Fritsch v. Caudill*, 146 S.W.3d 926 (Ky. 2004), are dispositive of petitioners’ contention that interference with their bargaining rights constitutes irreparable injury:

If appellants are correct that the Floyd Circuit Court is an improper venue for appellee's civil action, in due course, the trial court or an appellate court will so recognize and relief in the nature of dismissal for improper venue will be granted. As to great and irreparable injury, we see none. **Inconvenience, expense, annoyance, and other undesirable aspects of litigation may be present, but great and irreparable injury is not.**

146 S.W.3d at 930(footnote omitted, emphasis added.)

Because petitioners failed to satisfy the strict criteria for relief by original action, we do not reach the question of the propriety of the circuit court's ruling on intervention. Accordingly, the petitions for writs of prohibition and mandamus are hereby DENIED. The motion for intermediate relief is DENIED AS MOOT.

ENTERED: JUL 19 2011


JUDGE, COURT OF APPEALS