

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 17-CI-01348
Electronically filed

JEFFREY C. MAYBERRY, *et al.*

Plaintiffs

v.

KKR & CO. LLP, *et al.*

Defendants

**COMMONWEALTH'S REPLY IN SUPPORT OF ITS
MOTION TO INTERVENE**

The Commonwealth of Kentucky, by and through its Attorney General, filed a motion to intervene in this action on July 20, 2020. The Plaintiffs and the Defendants have filed responses to that motion.¹ The Defendants' objections to the Commonwealth's intervention in this action may generally be summarized as follows: (1) this Court lacks jurisdiction over the Commonwealth's motion due to the Supreme Court's opinion in *Overstreet v. Mayberry*, ___ S.W.3d ___, No. 2019-SC-000041-TG,

¹ See Blackstone Defendants' objection to AG's motion to intervene (Jul. 30, 2020); Officer & Trustee Defendants' opposition to Commonwealth's motion to intervene (Jul. 30, 2020); PAAMCO/Prisma Defendants' objection to AG's motion to intervene (Jul. 30, 2020); RVK Parties' objection to AG's motion to intervene (Jul. 30, 2020); KKR Parties' joinder in PAAMCO/Prisma Defendants' objection (Jul. 30, 2020); CavMac Defendants' joinder in Blackstone Defendants' objection (Jul. 30, 2020); Mayberry Plaintiffs' response to AG's motion to intervene (Jul. 31, 2020); Wyman Plaintiffs' opposition to Lerach Group's motion for lead/liaison counsel and support of AG's motion to intervene (Aug. 7, 2020).

2020 WL 4047469 (Ky. Jul. 9, 2020);² (2) the Commonwealth does not have the right to intervene in this action;³ (3) the Commonwealth's motion is untimely;⁴ and (4) the Commonwealth's motion is moot because of its filing a separate civil action.⁵ In this reply, the Commonwealth addresses each of these objections.

I. This Court has jurisdiction to consider the Commonwealth's motion to intervene.

The Defendants claim that this Court does not have jurisdiction even to consider the Commonwealth's motion to intervene. The arguments made by each Defendant differ slightly, but the Commonwealth will respond to each Defendant's position.

A. The pendency of the writ action in the Court of Appeals and Supreme Court did not divest this Court of jurisdiction over the case.

The Defendants argue that this Court lacked jurisdiction over this action during the pendency of the original action for a writ in the Court of Appeals, and later, on appeal in the Supreme Court.⁶ But the pendency of a writ action does not deprive the Circuit Court of jurisdiction over the case. "A trial court retains jurisdiction over the case and its discovery methodology despite a pending writ. But a trial court must respect the writ process and the party's right to proceed in that

² Blackstone objection pp. 6-7; Officer & Trustee opposition pp. 1-4; PAAMCO/Prisma objection pp. 4-6; RVK objection p. 7.

³ PAAMCO/Prisma objection pp. 6-7.

⁴ Blackstone objection pp. 7-13; Officer & Trustee opposition pp. 4-6; PAAMCO/Prisma objection pp. 7-9; RVK objection p. 8.

⁵ PAAMCO/Prisma objection pp. 9-10.

⁶ Officer & Trustee opposition pp. 1-2; PAAMCO/Prisma objection p. 4.

manner. Discovery in this case did not have to stop because of [the defendant’s] writ petition.” *Norton Hosps., Inc. v. Willett*, 483 S.W.3d 842, 847 (Ky. 2016). Because the pendency of the writ action in the Court of Appeals did not deprive the Court of jurisdiction, this Court was able to entertain and hear any motions, including the Commonwealth’s motion to intervene.

The appeal of the writ action to the Supreme Court deprived the writ issued by the Court of Appeals of finality. Its determination as to standing, and therefore this Court’s jurisdiction, was not final. Also, contrary to the assertion of the Officer and Trustee Defendants, it is not true that the “Writ was not disturbed by the Supreme Court’s July 9, 2020 decision resolving [the writ and interlocutory] appeals.”⁷ See *Overstreet*, 2020 WL 4047469, at *2 n.6 (“Our dismissal of this case [on constitutional standing grounds] renders the Writ Case moot.”). The writ itself therefore never took effect, and did not preclude the filing of the Commonwealth’s motion to intervene.

B. The interlocutory appeal did not divest this Court of jurisdiction over the case.

The Defendants also assert that the Officer and Trustee Defendants’ interlocutory appeal deprived this Court of jurisdiction.⁸ The basis of the interlocutory appeal was this Court’s denial of their motion to dismiss based upon qualified official immunity.⁹ As such, the scope of the interlocutory appeal was limited

⁷ Officer & Trustee opposition pp. 1-2.

⁸ Officer & Trustee opposition p. 2; PAAMCO/Prisma objection p. 5.

⁹ The Officers and Trustees also appealed the Court’s ruling on the constitutional standing issue. However, as the Supreme Court held, *Overstreet*, 2020 WL 4047469, at *3 (citing *Commonwealth, Cabinet for Health & Family Servs. v. Sexton*, 566 S.W.3d 185, 191-92 (Ky. 2018)), this Court’s ruling

to the specific issue of whether immunity was properly denied, and nothing more. *Baker v. Fields*, 543 S.W.3d 575, 578 (Ky. 2018).

“[I]n *Garnett v. Oliver*, [the Supreme Court’s] predecessor court held that ‘if the appeal from the particular order or judgment does not bring the entire cause into the appellate court ... further proceedings in the conduct of the cause may properly be had in the lower court.’ 242 Ky. 25, 45 S.W.2d 815, 817 (1931). *See also Commonwealth v. Bailey*, 71 S.W.3d 73, 84 (Ky. 2002) (‘An interlocutory appeal, however, generally only deprives the trial court of the authority to act further in the matter that is subject of the appeal, and the trial court is not divested of the authority to act in matters unrelated to the appeal.’)” *Commonwealth, Fin. & Admin. Cabinet v. Wingate*, 460 S.W.3d 843, 849 (Ky. 2015); *accord Weaver v. University of Cincinnati*, 970 F.2d 1523, 1528-29 (6th Cir. 1992) (“[A]n interlocutory appeal does not divest the trial court of jurisdiction to continue deciding other issues involved in the case.”) (citing cases); *Alice L. v. Dusek*, 492 F.3d 563, 564-65 (7th Cir. 2007) (appeal from a trial court’s interlocutory order denying qualified immunity does not divest the trial court of jurisdiction).

Because the permissible scope of the Officer and Trustee Defendants’ interlocutory appeal was limited to the issue of qualified official immunity, that issue was the only issue over which this Court was divested of jurisdiction during the pendency of that appeal. The remainder of the case, and all other issues within it,

on constitutional standing was not immediately appealable in and of itself, but could be reviewed when the immunity appeal was properly before the Supreme Court.

remained pending before this Court the entire time the interlocutory appeal was working its way through the appellate courts, until the decision of the Supreme Court became final. This Court therefor retained jurisdiction over other issues in the case, such as the Commonwealth's motion to intervene.

C. The Supreme Court's direction to "dismiss the complaint" because of lack of constitutional standing does not deprive the Court of jurisdiction to consider the Commonwealth's motion to intervene.

The final jurisdictional issue raised by the Defendants concerns the Supreme Court's holding that the Plaintiffs lacked standing to litigate this case. They assert that the Supreme Court's decision on the constitutional standing issue, and its direction to this Court to "dismiss the complaint," deprives this Court of jurisdiction to consider the Commonwealth's motion to intervene.¹⁰

The Commonwealth's motion to intervene was filed before the time the Supreme Court's *Overstreet* opinion became final. The final paragraph of the Supreme Court's opinion states, "We remand this case to the circuit court with direction to dismiss *the complaint*." *Overstreet*, 2020 WL 4047469, at *14 (emphasis added). The only complaint the Supreme Court had before it was the Plaintiffs' first amended complaint. The Commonwealth agrees that this Court therefore must dismiss the Plaintiffs' first amended complaint. But dismissing the complaint does not necessarily require dismissing the entire action, now that the Commonwealth's motion to intervene is pending.

¹⁰ Blackstone objection pp. 6-7; Officer & Trustee opposition pp. 2-4; PAAMCO/Prisma objection pp. 4-6; RVK objection p. 7.

In *Overstreet*, the Supreme Court did not purport to consider any issue other than the Plaintiffs' lack of constitutional standing and qualified immunity: "The only issues before this Court are whether the Plaintiffs have an injury in fact sufficient to support constitutional standing... and whether the trustee and officer defendants are entitled to immunity. Because we find that the Plaintiffs lack an injury in fact sufficient to support constitutional standing, we dismiss this case and do not reach the immunity issue." *Overstreet*, 2020 WL 4047469, at *2. The propriety of intervention was not before the Supreme Court. There is therefore no "law of the case" precluding consideration of the Commonwealth's motion to intervene.

Even after entry of a *final* judgment, it is within the discretion of the Court to permit the Commonwealth to intervene. *Arnold v. Commonwealth ex rel. Chandler*, 62 S.W.3d 366, 369 (Ky. 2001). Here, the Attorney General filed the motion to intervene before the finality of the Supreme Court's opinion in *Overstreet*. It is possible for this Court to both obey the Supreme Court's command to "dismiss the complaint" and also grant the Commonwealth's motion to intervene. The Commonwealth's motion therefore should be granted.

II. The Attorney General, on behalf of the Commonwealth, has a right to intervene in this action.

The Defendants assert that KRS 15.020 does not confer upon the Attorney General the right to intervene in this action. However, KRS 15.020 is a broad grant of authority to the Attorney General. Under that statute, the Attorney General "shall exercise all common law duties and authority pertaining to the office of the Attorney General under the common law." *Id.* Further, it also is incumbent upon the Attorney

General to “commence all actions or enter his appearance in all cases, hearings, and proceedings in and before all other courts, tribunals, or commissions in or out of the state, and attend to all litigation and legal business in or out of the state required of him by law, or in which the Commonwealth has an interest, and any litigation or legal business that any state officer, department, commission, or agency may have in connection with, or growing out of, his or its official duties.” *Id.*

At common law, the Attorney General has the power to bring any action which he thinks necessary to protect the public interest. *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 173 (Ky. 2009). This is “a broad grant of authority,” *Thompson*, 300 S.W.3d at 173, and includes “the power to institute, conduct and maintain suits and proceedings for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.” *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974). “[I]n the exercise of his common-law powers, an attorney general may not only control and manage all litigation in behalf of the state, but *he may also intervene in all suits or proceedings which are of concern to the general public.*” *Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710, 715 (Ky. 1973) (emphasis added; internal citation omitted).

The Supreme Court recognized the Attorney General’s standing to bring claims on behalf of the Commonwealth in *Overstreet*. The Court observed that the Attorney General has “the exclusive authority to sue on behalf of the state when the state is the only real party in interest.” *Overstreet*, 2020 WL 4047469, at *13 n.97. The very basis for the Court rejecting the Plaintiffs’ theory of derivative taxpayer standing was

that it is the prerogative of the Attorney General to decide whether to bring any claims on behalf of the Commonwealth. *Id.* at *13-14.

There can be no doubt that this action is one of concern to the general public. The Plaintiffs herein have claimed that the Defendants have damaged the Kentucky Retirement Systems to the tune of billions of dollars. The Attorney General is therefore entitled to intervene in this action, investigate the claims and defenses being asserted, and control and manage this litigation to the extent necessary to protect the Kentucky Retirement Systems. The motion to intervene by the Commonwealth should be granted.

The Blackstone Defendants make several additional arguments regarding the Commonwealth's right to intervene. They state that "[t]he Commonwealth was not a party to" their investment contracts with Kentucky Retirement Systems,¹¹ and that, therefore, "these claims belong to KRS,"¹² not the Commonwealth. However, these arguments ignore the clear authority of the Attorney General to "attend to ... any litigation or legal business that any state officer, department, commission, or agency may have in connection with, or growing out of, his or its official duties." KRS 15.020. By seeking to intervene in this action, the Attorney General, on behalf of the Commonwealth, seeks to do just that, and "attend to" the "legal business" of Kentucky Retirement Systems in connection with its official duties.¹³ In any event, the Attorney

¹¹ Blackstone objection p. 10.

¹² *Id.* at 11.

¹³ In addition, the Attorney General is empowered to "act as legal adviser and attorney for the board" of the Kentucky Retirement Systems. KRS 61.645(11).

General need not have a personal interest in the outcome of the litigation to have standing to seek redress on behalf of the Commonwealth. *Thompson*, 300 S.W.3d at 173. The Defendants' contracts with Kentucky Retirement Systems do not preclude the Attorney General's involvement in this action on behalf of the Commonwealth.

III. The Commonwealth's motion is not untimely.

Both CR 24.01 and CR 24.02 require a motion to intervene to be "timely." Because (1) this Court retained jurisdiction over this action even while the writ case and the interlocutory appeal were pending in the Supreme Court, and (2) the Commonwealth filed its motion to intervene before the Supreme Court's decision became final, the Commonwealth's motion is not untimely, and should be granted.

While the Defendants argue that the Commonwealth's motion is untimely because they have been litigating this case for two and a half years, the duration of this litigation to date is not the only factor to be considered.¹⁴ There has been a great deal of *procedural* posturing concerning motions for protective orders, but it appears from the Court's record in this action that there has been little substantive discovery taken to date beyond some initial document requests. No depositions have been taken. The long, arduous path this litigation has taken has all been a result of the Plaintiffs' novel theory of standing (which the Supreme Court has rejected) and the Defendants' motions to dismiss attacking the Plaintiffs' debunked theory. To date, as far as the Commonwealth can tell from the record, there have been no summary

¹⁴ The Attorney General does not know why his predecessor in office declined to get involved in this litigation and left it to the Plaintiffs to represent the interests of the Commonwealth. It should be noted, however, that this Office made the decision to intervene merely seven months into the current Attorney General's term.

judgment motions directed to the *merits* of the claims asserted by the Plaintiffs, and now, by the Commonwealth. Despite the longevity of this case, it has not advanced so far on the *substance* of the claims that the Defendants would be prejudiced by the Commonwealth's intervention.

But even if this Court determines that the motion to intervene is untimely, that does not end the Court's inquiry. The Supreme Court has held that Civil Rule 24 "does not forbid post judgment intervention," and that whether to permit late intervention is within the discretion of the trial court. *Arnold*, 62 S.W.3d at 369; *see also Odle v. Flores*, 899 F.3d 344, 345 (5th Cir. 2017) (rejecting the argument that intervention is always improper after a case has been dismissed). A motion to intervene can survive either the mootness or dismissal of the plaintiffs' claims. *In re Brewer*, 863 F.3d 861, 871-73 (D.C. Cir. 2017). "That the intervenors *could* have intervened earlier ... does not mean they *should* have intervened earlier, making their motion untimely." *Id.* at 872 (emphasis in original; citation and internal quotation omitted).

Here, Attorney General Cameron assumed office on December 17, 2019. During the entirety of the next seven months, this case was in abeyance in this Court, and under submission on the appeal in the Supreme Court. No discovery, no motion practice, and no other activity was proceeding in the litigation. The Commonwealth's motion to intervene was brought within days of the Supreme Court's determination of the standing question in *Overstreet*, and within months of Attorney General

Cameron's taking office. Under the circumstances, the Commonwealth's motion is not untimely. This Court should grant the motion to intervene.

IV. The filing of a separate civil action does not moot the Commonwealth's motion in this action.

Without citing to any legal authority, several of the Defendants assert that the Commonwealth's separate lawsuit filed the day after its motion to intervene effectively "moots" the motion to intervene.¹⁵ The Commonwealth is unable to locate a case in which a Kentucky appellate court held that the subsequent filing of a separate civil action "moots," or somehow precludes, intervention into an existing case. That alone should be sufficient for the Court to reject the proposition. Rather, the law in the Commonwealth appears to be to the contrary—if multiple civil actions are filed involving the same claims and the same parties, the first action filed should proceed and the later-filed action should be held in abeyance. *See Brooks Erection Co. v. William R. Montgomery & Assocs., Inc.*, 576 S.W.2d 273, 275 (Ky. App. 1979) ("[T]he law is well settled that a second action based on the same cause will generally be abated where there is a prior action pending in a court of competent jurisdiction [w]ithin the same state, between the same parties, involving the same or substantially the same subject matter and cause of action, and in which prior action the rights of the parties may be determined and adjudged.").

Here, the Commonwealth would prefer to litigate in this action, but filed a separate action as a belt-and-suspenders approach in the event the Court denied its

¹⁵ The Commonwealth notes that the two actions have been consolidated by the Court.

motion to intervene. The Commonwealth should not be penalized for its prudence in ensuring its claims could be heard in this forum. Now that the Court has consolidated the two actions in any event, there is no longer a “separate” proceeding to which the Court might defer. The Court should grant the Commonwealth’s motion to intervene and allow the consolidated action to proceed.

V. Conclusion

For the foregoing reasons, the Commonwealth’s motion to intervene should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 10, 2020, a copy of the above was filed electronically with the Court and served through the Court's electronic filing system upon the following:

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