COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CASE NO. 17-CI-1348
FILED ELECTRONICALLY

JEFFREY C. MAYBERRY, et al. PLAINTIFFS

v.

KKR & CO. L.P., et al. DEFENDANTS

PAAMCO/PRISMA DEFENDANTS' OBJECTION TO THE OFFICE OF THE ATTORNEY GENERAL'S MOTION TO INTERVENE ON BEHALF OF THE COMMONWEALTH OF KENTUCKY

Come now the Defendants, Prisma Capital Partners LP, Girish Reddy, PAAMCO Prisma, LLC (formerly Pacific Alternative Asset Management Company, LLC), and Jane Buchan, by and through counsel, and hereby submit this opposition to the July 20, 2020 motion by the Office of the Attorney General ("OAG") to file an "Intervening Complaint" in this action ("Motion to Intervene").[1] The OAG no longer has the ability to participate in this action, which the Kentucky Supreme Court confirmed was a nullity from inception and must be dismissed.

First, this Court lacks jurisdiction to adjudicate the Motion to Intervene and cannot act beyond the narrow and specific mandate delineated in the Supreme Court's July 9, 2020 decision, which unambiguously held that this Court lacks subject matter jurisdiction and then instructed this Court to dismiss the complaint upon remand. Nothing in the Supreme Court's decision allows the Court to entertain further motion practice or otherwise keep this case open.

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[1] The PAAMCO/Prisma Defendants submit this objection without waiving, and expressly preserving, their argument that this Court lacks jurisdiction to act on the Motion to Intervene or take any other action beyond dismissing this case consistent with the Supreme Court's directive. The PAAMCO/Prisma Defendants reserve all rights with respect to the proposed Intervening Complaint.

Second, even if the Court had authority to adjudicate the Motion to Intervene, intervention here would be improper. The OAG has not established an "unconditional right" to intervene and its request for permissive intervention, made over two and a half years into the litigation, after having previously declined to bring these claims, is untimely. The OAG was on notice of any potential interests it had in this action *before* Plaintiffs filed it in December 2017. If it believed these claims had any merit – which they plainly do not – the OAG could have brought the claims directly or sought to intervene on countless occasions since then, including when Defendants first asserted that Plaintiffs lacked standing to sue on behalf of the Commonwealth and this Court lacked subject matter jurisdiction. The OAG declined to do so, and the parties and the courts proceeded to expend substantial resources litigating the issue of Plaintiffs' standing. Rule 24.01 was not intended to be used as a "wait and see" mechanism at the expense of the parties to the lawsuit and with total disregard for judicial economy. In any event, intervention is not available under Rule 24.01 or 24.02 if – as in this case – it would be futile because the claims in intervention are legally flawed and untimely.

Finally, the OAG has mooted its own request for intervention by commencing a standalone action captioned *Commonwealth v. KKR & Co. Inc.*, Case No. 20-CI-00590, with a complaint essentially identical to its proposed Intervening Complaint here. If the OAG wishes to pursue these meritless claims, the OAG must push forward with a new action.

BACKGROUND

Prior to commencing this action, Plaintiffs approached the OAG and requested that it prosecute these claims on behalf of the Commonwealth. *See* Ex. 1 [December 19, 2017 Letter from Ann B. Oldfather letter to the Attorney General of Kentucky]. The next day, the OAG declined to do so. *See* Ex. 2 [December 20, 2017 Letter from J. Michael Brown, OAG, to Ann

B. Oldfather]; Compl. ¶ 24 (Original Complaint alleging that "Plaintiffs have made demand in writing upon the Attorney General of Kentucky to assert the taxpayer claims set forth herein and that demand was declined.").

As Your Honor is aware, the Parties then spent two-and-a-half years litigating this case. Defendants actively challenged the legitimacy of the claims, not only based on Plaintiffs' lack of standing to bring "derivative" claims on behalf of the Commonwealth or its agency, but also because the claims against PAAMCO, Prisma and BAAM (the "Investment Manager Defendants") simply made no sense. Plaintiffs were trying to blame the Investment Manager Defendants for billions of dollars in unfunded pension liabilities that arose and were publicly identified long before the Investment Manager Defendants contracted with KRS. Moreover, Plaintiffs were arguing that the Investment Manager Defendants, by performing *in accordance with* investment contracts negotiated at arms-length with KRS and its advisors, somehow breached common law tort duties. Presumably in recognition of this reality, the OAG never once, throughout the lifespan of this litigation, sought to intervene or initiate these claims directly.

On July 9, 2020, the Kentucky Supreme Court confirmed that Plaintiffs lack standing under the Kentucky Constitution to assert claims against KRS contractors and other individuals and entities on behalf of the KRS Board of Trustees or the Commonwealth at large. As the Supreme Court unanimously held, "as beneficiaries of a defined-benefit plan who have received all of their vested benefits so far and are legally entitled to receive their benefits for the rest of their lives, [Plaintiffs] do not have a concrete stake in this case. And without a concrete stake in the case, the Plaintiffs lack constitutional standing to bring their claims in our courts." *Overstreet v. Mayberry et al.*, No. 2019-SC-000041-TG, 2020 Ky. LEXIS 225, at *38 (Ky. July

9, 2020). The Supreme Court has now remanded the case to this Court "with direction to dismiss the complaint." *Id.* at *6; *see also id.* at *10 ("Because we find that the Plaintiffs lack an injury in fact sufficient to support constitutional standing, we dismiss this case . . . .").

On July 20, 2020, the OAG filed a Motion to Intervene seeking permission to file in this action, prior to its dismissal, an Intervening Complaint that adopts verbatim the flawed claims in the *Mayberry* Complaint. On July 21, 2020, the OAG also initiated a standalone action, *Commonwealth v. KKR & Co. Inc.*, Case No. 20-CI-00590, by filing the same complaint. That matter has been assigned to Judge Wingate. On July 29, 2020, the *Mayberry* Plaintiffs, seemingly encouraged by the OAG's filings, filed a "Motion for Leave to File Second Amended Complaint" seeking leave to re-plead their claims against a subset of Defendants.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO ACT ON THE MOTION TO INTERVENE

This Court lacks jurisdiction to consider the OAG's Motion. On January 8, 2019, PAAMCO, Prisma and several other defendants petitioned the Court of Appeals for a writ of prohibition prohibiting this Court from hearing this case. On April 23, 2019, the Court of Appeals granted the writ and vacated this Court's November 30, 2018 Opinion and Order based on its determination that the Court lacks subject matter jurisdiction to hear this case. On July 9, 2020, the Kentucky Supreme Court released its unanimous decision confirming that, under the Kentucky Constitution, this Court lacks subject matter jurisdiction over this case. *Overstreet*, 2020 Ky. LEXIS 225, at *38. Accordingly, "[t]he circuit court has jurisdiction to enter but one order in this case – an order dismissing for lack of subject matter jurisdiction. All other orders entered in this action – past, present, or future – are void *ab initio*." *Public Serv. Comm'n of*

Kentucky v. Shepherd, No. 2018-CA-01859-OA, 20199 Ky. App. LEXIS 31, at *28 (Ky. App. Mar. 6, 2019) (citing *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 833 (Ky. App. 2008)).

Given this Court's lack of subject matter jurisdiction, the decretal paragraph of the Supreme Court decision gives this Court a clear and specific direction to dismiss the complaint upon remand. The Supreme Court's decision became final today. *See* C.R. 76.30 (providing that a decision of the Supreme Court shall not become final until the 21st day after it is entered). Until the Supreme Court Clerk transmits the case to the Franklin County Circuit Court and its final decision is entered on the docket, this Court lacks jurisdiction to take any action with respect to this case, including the OAG's Motion to Intervene. *Johnson v. Commonwealth*, 17 S.W.3d 109, 113 (Ky. 2000) ("[T]he filing of a notice of appeal divests the trial court of jurisdiction to rule *on any issues* while the appeal is pending.") (emphasis added).[2]

Once the case is returned to Franklin County, this Court's jurisdiction will be restored only for the exclusive and limited purpose of carrying out the Supreme Court's mandate. That mandate is narrowly tailored and unambiguous: "We remand this case to the circuit court with direction to dismiss the complaint." *Overstreet*, 2020 Ky. LEXIS 225, at *38. It does not authorize further motion practice, including motions to intervene or motions to file amended complaints. Under Kentucky's mandate rule, this Court's authority on remand is strictly limited to the Supreme Court's instruction, and the ***only*** action this Court is authorized to take is to dismiss the complaint consistent with that instruction. *See Brown v. Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010) (holding that "on remand from a higher court, a lower court must obey and give effect to the higher court's express or necessarily implied holdings and

[2] This Court has recognized that "there is a substantial question as to whether [the circuit court] retains jurisdiction to adjudicate . . . pending motions while this case is on appeal to the Kentucky Supreme Court." Sept. 25, 2019 Order at 1.

instructions"); *Buckley v. Wilson*, 177 S.W.3d 778, 781 (Ky. 2005) ("The court to which the case is remanded is without power to entertain objections or make modifications in the appellate court decision." (internal quotation marks and citation omitted)). As the Court of Appeals has emphasized, where, as here, the mandate is plain and clear, the Circuit Court has no alternative but to comply with it. *See Ken Jordan & Ken Jordan Contrs., LLC v. Hibbeln*, No. 2019-CA-000310-MR, 2019 Ky. App. Unpub. LEXIS 832, at *5-6 (Ky. App. Nov. 22, 2019).

II. INTERVENTION WOULD BE IMPROPER REGARDLESS

A. The OAG Does Not Have An Unconditional Right To Intervene

On a motion to intervene, the burden is on the movant to establish its entitlement to intervene as a matter of right. *Farmers & Traders Bank v. Ashbrook*, No. 2010-CA-002213-MR, 2012 Ky. App. Unpub. LEXIS 243, at *4 (Ky. App. Mar. 23, 2012). The OAG moves for intervention pursuant to Rule 24.01, which allows intervention as of right "when a statute confers an unconditional right to intervene." CR 24.01. The OAG fails to identify any statute conferring such a right here.

While the OAG invokes KRS 15.020 to argue that the Attorney General may, as the Commonwealth's chief law officer, "appear" in cases in which the Commonwealth has an interest, KRS 15.020 is not a broad grant of intervention rights. To the contrary, the fact that the Legislature specifically granted the OAG the right to intervene in certain instances (*see, e.g.*, KRS 15.231, KRS 15.232 and KRS 15.240) reflects that the Legislature did not intend to create a general right to intervene in KRS 15.020. The OAG's interpretation of KRS 15.020 would render such provisions superfluous. *See* Kentucky Practice Series, 11 Ky. Prac. Civ. Proc. Forms § 54:1 ("An example of CR 24.01(1)(a) is KRS 418.075 which authorizes the attorney general to intervene in an action involving the validity of a statute or the constitutionality of an ordinance or franchise."); *see also Shepherd*, 2019 Ky. App. LEXIS 31, at *13 (holding that KRS

367.150(8)(b) grants attorney general the right to intervene in an action on behalf of consumer interests involving a quasi-judicial or rate-making proceeding).

B. OAG's Motion For Permissive Intervention Is Untimely

The OAG's request for permissive intervention under Rule 24.02 is untimely. Intervention, whether permissive or as of right, must be made upon a "timely" application. CR 24.01(1); CR 24.02. The OAG, as movant, has the burden to demonstrate timeliness. *Pearman v. Schlaak*, 575 S.W.2d 462, 463 (Ky. 1978). In assessing timeliness, courts consider, among other factors: (1) "the point to which the suit has progressed"; (2) "the purpose for which intervention is sought;" (3) "the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case"; and (4) "the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention." *Am. Sav. Bank v. Citizens Nat'l Bank*, No. 2011-CA-000325-MR, 2012 Ky. App. Unpub. LEXIS 874, at *11 (Ky. App. Nov. 16, 2012) (internal quotation marks and citation omitted); *see also Hazel Enters., LLC v. Cmty. Fin. Servs. Bank*, 382 S.W.3d 65, 68 (Ky. App. 2012).

All of these factors weigh against allowing the OAG's intervention here. First, this suit has progressed to completion. The Supreme Court has found that the Court lacks subject matter jurisdiction and directed that the case be dismissed. Defendants and the Court have devoted an enormous amount of time and other resources to litigating this matter. There were dispositive motions. There was discovery. There was motion practice on a number of issues. And there were appeals to the Court of Appeals and the Supreme Court. The case is now over.

Second, the only purpose articulated by the OAG for its Motion to Intervene – a desire to "vindicate public rights as 'attorney for the people of the State of Kentucky'" (Motion at 3) – is a

purpose that would have existed at the outset of this case and does not warrant intervention at this late date, following the Supreme Court's determination that this case was a nullity from the start and must be dismissed. Moreover, the OAG's filing of a standalone action with a complaint substantially identical to its proposed Intervening Complaint would appear to serve the OAG's purpose without needing to intervene in a lawsuit that has been dismissed. *See infra* Point III.

Third, the OAG has known about the Commonwealth's potential interest in this case since before it was filed two-and-half years ago and yet the OAG elected not to intervene. This action was filed in December 2017 with the OAG's full knowledge. Counsel for Plaintiffs sent the OAG a draft of their proposed complaint and requested that the Attorney General institute and prosecute the taxpayer claims directly. The OAG declined. Kentucky procedure does not afford interested parties the right to take a "wait and see" approach whereby they can wait for more than two and a half years before deciding to seek intervention in a litigation. Rule 24.01 was not intended to be a contingency plan for non-parties. *See Murphy v. Lexington-Fayette Cty. Airport Bd.*, 472 S.W.2d 688, 690 (Ky. Nov. 5, 1971) (holding that Rule 24.01 was not intended to allow a nonparty to "simply lie back and await the result of the action in the circuit court"); *see also Blount-Hill v. Zelman*, 636 F.3d 278, 285-86 (6th Cir. 2011) (holding that Rule 24.02 similarly requires proposed intervenors to act promptly after discovering their interest in the litigation rather than waiting for subsequent events); *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 584 & n.3 (6th Cir. 1982) (holding that proposed intervenors "should have attempted to intervene when they first became aware of the action rather than adopting a 'wait-and-see approach'"). The OAG's suggestion that the timeliness of its Motion should be measured as of the date of the Supreme Court's ruling is misplaced. Kentucky courts have consistently held that the relevant inquiry is "the length of time preceding the application during which the proposed intervenor

knew or reasonably should have known *of his interest in the case*." *See Am. Sav. Bank*, 2012 Ky. App. Unpub. LEXIS 874, at *11 (internal quotation marks and citation omitted) (emphasis added). Here, the OAG had such knowledge as of December 2017.

Fourth, the OAG's delay in seeking intervention has prejudiced Defendants. In assessing prejudice to the original parties to the action, Kentucky courts – like their federal counterparts – focus the inquiry on the prejudice caused by the proposed intervenor's delay rather than the prejudice caused by the intervention itself. *See Kirsch v. Dean*, 733 Fed. App'x 268, 278 (6th Cir. 2018); *Mason v. Rockcastle Cnty. Fiscal Court*, No. 2012-CA-001552-MR, 2015 Ky. App. Unpub. LEXIS 328, at *5 (Ky. App. May 15, 2015) (denying intervention where opposing party would be prejudiced because case had been "litigated . . . to termination" before intervention was sought). Here, Defendants devoted substantial time and resources defending this action based on the understanding that the OAG recognized these claims were meritless and did not wish to pursue them. Against that backdrop, Defendants sought dismissal based on Plaintiffs' lack of standing in this Court, at the Court of Appeals, and ultimately before the Supreme Court. Thousands of pages of briefs have been filed and numerous hearings have been held over the past two-and-a-half years that may have been unnecessary if the OAG had determined on a timely basis that the OAG (rather than private interests) wished to exert control over claims supposedly being prosecuted "on behalf of" the Commonwealth and its agency.

III. THE MOTION TO INTERVENE HAS BEEN MOOTED BY THE OAG'S OWN ACTIONS

Finally, the Motion to Intervene has also been mooted by the OAG's own actions. On July 21, 2020, the OAG separately filed a new complaint that is substantively identical to the Intervening Complaint it seeks leave to file here. That case is captioned *Commonwealth v. KKR & Co. Inc.*, Case No. 20-CI-00590. The OAG's filing of a separate, standalone lawsuit renders

its Motion to Intervene in this lawsuit moot. Whatever interests the OAG purports to have in prosecuting these claims are protected via the filing of its own lawsuit. This case, however, must be dismissed.

CONCLUSION

For the reasons stated herein, the PAAMCO/Prisma Defendants respectfully request that the Court decline to hear the OAG's Motion to Intervene, and dismiss the case pursuant to the direction of the Kentucky Supreme Court.

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CERTIFICATE OF SERVICE

The above signature certifies that, on July 30, 2020, the foregoing was electronically filed with the Clerk of the Court using the KCOJ e-filing system and pursuant to Notices of E-Service served via email pursuant to CR 5.02(2), to the following:

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Exhibit 1

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December 19, 2017

(via hand-delivery)
The Honorable Andrew G. Beshear
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RE: Proposed Taxpayer Litigation

Dear General Beshear:

As counsel for the named plaintiffs in the proposed derivative lawsuit on behalf of the Kentucky Employees Retirement System and Kentucky's Taxpayers attached as Exhibit A, we respectfully demand that your office institute and prosecute the taxpayer claims asserted in the draft Complaint (attached as Exhibit A) on behalf of Kentucky's taxpayers as *parens patriae*.

We understand that the present involvement of the Attorney General in litigation with the Executive Department over the legality and authority of the current Board of Directors of Kentucky Employees Retirement System may in and of itself be sufficient reason for your office to choose not to prosecute the claims on behalf of the Kentucky taxpayers. If this is the case, we ask you to confirm that we may proceed to file and prosecute the claims asserted in Exhibit A to this letter on behalf of Kentucky's taxpayers.

We will gladly arrange for your office to be placed on the service list of the litigation so that you may monitor the litigation and take such actions as you deem appropriate to protect the interests of Kentucky taxpayers.

Sincerely,

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Exhibit 2

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December 20, 2017

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RE: Proposed Taxpayer Litigation

Dear Counsel:

This Office has reviewed your letter of December 19, 2017, as well the draft complaint attached to the letter. At this time, the Office of Attorney General would be unable to bring the claims outlined in the complaint because of on our current action involving the Kentucky Retirement System that is pending in Franklin Circuit Court. We anticipate that action will include appeals that will last several years.

Because of the pending litigation, we have not evaluated the validity of any of the claims made in the draft complaint. From our initial review, such a lawsuit would require counsel that can absorb significant costs and have particular experience in securities law.

ANDY BESHEAR
ATTORNEY GENERAL

J. Michael Brown
Deputy Attorney General

JMB:arh

Unpublished Cases

Am. Sav. Bank v. Citizens Nat'l Bank

Court of Appeals of Kentucky

November 16, 2012, Rendered

NO. 2011-CA-000325-MR

Reporter
2012 Ky. App. Unpub. LEXIS 874 *; 2012 WL 5829788

AMERICAN SAVINGS BANK, FSB, APPELLANT v. CITIZENS NATIONAL BANK, APPELLEE

Core Terms

intervene, mortgage, foreclosure, FSB, notice

Notice: THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, *CR 76.28(4)(c)*, THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Counsel: BRIEFS FOR APPELLANT: John R. McGinnis, Greenup, Kentucky.

BRIEF FOR APPELLEE: Jill Hall Rose, Lexington, Kentucky.

Judges: BEFORE: MOORE AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE. VANMETER, JUDGE, CONCURS. MOORE, JUDGE, CONCURS IN RESULT ONLY.

Opinion by: Joseph E. Lambert

Subsequent History: Review denied by *Am. Sav. Bank, F.S.B. v. Citizens Nat'l Bank, 2013 Ky. LEXIS 517 (Ky., Aug. 21, 2013)*

Prior History: **[*1]** APPEAL FROM GREENUP CIRCUIT COURT. HONORABLE ROBERT B. CONLEY, JUDGE. ACTION NO. 09-CI-00028.

Opinion

AFFIRMING

LAMBERT, SENIOR JUDGE: American Savings Bank,

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580. Senior Judge Lambert authored this opinion prior to the completion of his senior judge service effective November 2, 2012. Release of the opinion was delayed by administrative handling.

FSB ("Appellant") appeals from an order of the Greenup Circuit Court denying its motion to intervene in a foreclosure action in which the subject real property had been sold more than a year earlier. After reviewing the record and the parties' briefs, we conclude that the circuit court did not err in denying Appellant's motion as untimely. Thus, we affirm.

Facts and Procedural History

Citizens National Bank ("Appellee") **[*2]** filed a foreclosure action against David and Linda Sipple on January 15, 2009. Appellee held a first and superior mortgage in the principal sum of $300,000.00 against real property owned by the Sipples. The complaint also listed "American Savings Bank" as a defendant because the title work indicated that this bank held a second mortgage on the property.[2] The specific paragraph naming "American Savings Bank" as a defendant provided, in its entirety, as follows:

> 13. That the Defendant, American Savings Bank, is made a party to this action to assert any interest it may have in the subject real property, and said Defendant should come forth and assert any claim or interest in and to the subject real property that it might have, or forever be barred.

No address for "American Savings Bank" was disclosed.

Appellee attempted to serve "American Savings Bank" through the office of the Kentucky Secretary of State via the long-arm statute (*KRS 454.210*) on February 17, 2009. According to Appellee, a search **[*3]** of the Secretary of State's records revealed a listing for "American Savings Bank" showing that it had a registered agent for service of process at 335 Broadway, New York, New York 10013.[3] A summons was served at that address through the Secretary of State but was returned unopened and marked as undelivered. The reason for this was that the second mortgage was held not by "American Savings Bank" but by American Savings Bank, *FSB* — apparently an entirely different entity. Consequently, service was attempted on the incorrect party, and Appellant had no legal notice of the foreclosure action.[4]

On March 30, 2009, Appellee filed a "Motion for Default Judgment, Summary Judgment and Order of Sale" against several defendants, including Appellant. After receiving no response from Appellant, the circuit court found that Appellee had a first and superior lien and entered a default judgment in Appellee's favor on April 16, 2009. The **[*4]** case was then referred to the Greenup County Master Commissioner for a judicial sale.[5] On June 22, 2009, the Greenup County Master Commissioner sold the property to Appellee for a credit bid of $231,000.00.[6] The sale was confirmed, and the Master Commissioner executed a deed to Appellee on August 28, 2009.

In October or November 2009, Hon. Jill Hall Rose, counsel for Appellee, was made aware of Appellant's concern that it had not been properly served in the foreclosure action and that its interest regarding its second mortgage had not been fully protected as a result. In response to this concern, Rose contacted Appellant directly on November 10, 2009, and spoke to Tom Wamsley, whom she understood was an officer at the bank. Wamsley advised Rose that he was familiar with the case and was aware that a foreclosure action had been filed. Wamsley also indicated that the Sipples had not paid their mortgage with Appellant for many months. Wamsley further advised Rose that the bank had retained Hon. John Thatcher, an attorney in Portsmouth, Ohio, to look **[*5]** into the matter.

On November 12, 2009, Rose contacted Thatcher regarding the foreclosure action and the issue of Appellant's mortgage interest. He advised her that he would get back with her about the case. On November 23, 2009, Rose again contacted Thatcher and was told that Appellant was considering paying off the first mortgage and taking deed to the subject property. Thatcher also told Rose that he would get back to her promptly.

However, after not hearing from Thatcher, Rose sent an email on December 4, 2009, asking for a status update. The email specifically provided as follows:

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[2] The Sipples entered into their mortgage with Appellee on July 12, 2004, and their mortgage with Appellant on July 25, 2005. Therefore, there is no dispute that Appellee's mortgage had first priority.

[3] Those records also reflect that "American Savings Bank" is listed as "inactive" and that its last annual report was filed on July 1, 1981.

[4] Appellant has no agent for service of process in Kentucky and is not required to maintain such an agent. *See KRS 286.2-670(1)(a)*.

[5] The judgment was in the amount of $288,107.78 plus interest, costs, and attorneys' fees.

[6] The appraised value of the property was $350,000.00.

> John
> My client is getting upset that I don't have an answer for them on the American Savings Bank mortgage issue. Apparently, they want to sell the property & take their loss.
> Can you let me know something asap? Thanks.

Rose followed up with another email explaining that the total payoff on the first mortgage was $348,785.00 but that Appellee was willing to sell the property for $278,000.00, as that amount represented its fair market value. Thatcher replied that he would get back to Rose immediately.

Ultimately, though, neither Thatcher nor anyone else acting on Appellant's behalf followed up on the matter by **[*6]** contacting Rose or by filing any pleadings with the circuit court. Accordingly, on December 10, 2009, Appellee filed a "Motion to Determine Validity of Service or in the Alternative Motion to Set Aside Sale and Void the Deed" based on Appellant's concerns. Appellee asked for an order establishing that service of process upon Appellant was proper under the circumstances because Appellant did not have an agent for service of process in Kentucky and because Appellee was entitled to rely upon the records of the Secretary of State in attempting to effectuate service on an out-of-state party. Appellee additionally contended that Appellant had not been prejudiced in any way because even if the property were resold, there would not be sufficient proceeds from such sale to satisfy Appellee's mortgage, let alone any inferior mortgage. In the alternative, Appellee asked that the sale be set aside and that a warning order attorney be appointed to formally advise Appellant of the action so that the property could be resold. It does not appear that any attempt to serve Appellant with summons was made, and no copy of this motion was mailed to Appellant or anyone purporting to be a representative **[*7]** of the bank.

The circuit court heard the motion on December 17, 2009, and entered an order on January 13, 2010, finding that Appellant had been properly served and that the sale of the subject property should not be set aside. The court specifically found that Appellant had failed to register an agent for service of process in Kentucky and that Appellee consequently had acted appropriately by relying upon the records of the Secretary of State in attempting service. The order was prepared by Rose and reflects that it was mailed to "American Savings Bank" at the incorrect New York address listed above.

On April 16, 2010, Appellee sold the property to what appears to have been an innocent third-party purchaser. Nothing more occurred in the case until December 6, 2010, when Appellant moved to intervene pursuant to *Kentucky Rules of Civil Procedure ("CR") 24.01* and to set aside the judicial sale pursuant to *CR 60.02* because it had not been properly served in the foreclosure action. Appellant specifically argued that Appellee had attempted to serve the wrong bank since Appellant's actual legal name was "American Savings Bank, FSB." Appellant also noted that its mailing address and physical **[*8]** address were both clearly listed on its mortgage, yet there was no evidence that Appellee had tried to serve the bank at either of these addresses. Appellant further contended that Appellee's reliance upon the records of the Secretary of State was unreasonable since that office's records regarding "American Savings Bank" had not been updated since 1981.

Appellee argued in response that Appellant was not entitled to intervene since it had possessed actual knowledge of the foreclosure action for more than a year and had failed to timely assert its rights. Appellee also noted that Appellant had been aware for more than two years that its mortgage was not being paid. Appellee additionally observed that the face of Appellant's mortgage inconsistently listed both "American Savings Bank" *and* "American Savings Bank, FSB" as the name of the bank. Therefore, Appellee contended that it had handled service in an appropriate manner under the circumstances.

On January 20, 2011, the circuit court entered an order denying Appellant's motion to intervene as untimely. The court explained its decision as follows:

> 1. It is undisputed that the Movant American Savings Bank, fsb was aware of this court action **[*9]** and the foreclosure sale in November 2009. Notwithstanding, the Movant and their counsel at the time took no steps to intervene in this case for over a year. The real estate was thereafter sold to an innocent third party purchaser on April 16, 2010.
> ***
> 3. Upon review of the undisputed facts of this case, the court finds that the Movant American Savings Bank, fsb did not make a timely application to intervene in this action pursuant to CR 24. The Movant waited over a year after it had actual notice that the property was sold at a foreclosure sale. The Movant has no justification for this delay in asserting its right of intervention.
> Further, while the court does not need to address the merits of the Movant's argument regarding

> service, it is noted that the Movant could have better protected its interest by registering an Agent for Service of Process in the State of Kentucky and by clearly and unambiguously setting forth its proper legal name on the mortgage.

This appeal followed.

Analysis

On appeal, Appellant's brief is primarily devoted to the merits of setting aside the subject judicial sale because of a lack of proper service. However, as correctly noted by Appellee, the focus of this **[*10]** appeal instead must be upon the circuit court's refusal to allow Appellant to intervene in the proceedings. Since Appellant was a nonparty below, the question of whether it should have been allowed to intervene was a threshold determination that had to be satisfied in Appellant's favor before it could directly challenge the sale. *See* Arnold v. Com. ex rel. Chandler, 62 S.W.3d 366, 368 (Ky. 2001). The right to intervene is governed exclusively by CR 24. *See Murphy v. Lexington-Fayette County Airport Bd., 472 S.W.2d 688, 689-90 (Ky. 1971)*.

KRS 426.006 and 426.690 require a party seeking to foreclose on property to name as defendants all other parties holding a lien on the same property. *See also* U.S. Bank, NA v. Hasty, 232 S.W.3d 536, 541 n.7 (Ky. App. 2007); PNC Bank, N.A. v. Citizens Bank of Northern Kentucky, Inc., 139 S.W.3d 527, 529 (Ky. App. 2003). Therefore, as a mortgage holder with an interest in the property that was the subject of the underlying foreclosure action, Appellant had a right to intervene. *CR 24.01(1)*. This does not appear to be in dispute.

However, even intervention as a matter of right is permitted only upon timely application. Id.; *see also* Duncan v. First Nat. Bank of Jasper, 573 So. 2d 270, 274 (Ala. 1990). **[*11]** A circuit court's evaluation of the timeliness of a motion to intervene under *CR 24.01* is reviewed under an abuse of discretion standard. Carter v. Smith, 170 S.W.3d 402, 408 (Ky. App. 2004). Ultimately, "[t]imeliness is a question of fact, the determination of which should usually be left to the judge." Ambassador College v. Combs, 636 S.W.2d 305, 307 (Ky. 1982). In considering whether a motion to intervene was timely, a circuit court may consider the following factors:

> "(1) [T]he point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention."

Carter, 170 S.W.3d at 408, *quoting* Grubbs v. Norris, 870 F.2d 343, 345 (6th Cir. 1989).

In the case before us, nearly all of these factors support the circuit court's decision **[*12]** to deny Appellant's motion to intervene as untimely. Appellant contends that the circuit court's determination ignored the fact that it had never been served with formal summons in this action and had only learned about the lawsuit after the property had been sold in foreclosure. However, even assuming that service was faulty or otherwise unsatisfactory, the record is uncontroverted that Appellant was subsequently made fully aware of the foreclosure action and judicial sale yet took no action whatsoever to protect its interest until more than a year later and after the subject property was again sold to a third party.

In Monticello Elec. Plant Bd. v. Board of Educ., 310 S.W.2d 272 (Ky. 1958), the then-Court of Appeals held that a party seeking to intervene in an action after judgment was entered had a "special burden of justifying the apparent lack of timeliness." Id. at 274; *see also* Arnold, 62 S.W.3d at 369 (reiterating that "[a] party wishing to intervene after final judgment has a 'special burden' to justify the untimeliness").[7] Notably, the appellant in *Monticello* asserted that it had not received formal notice of the action, but in affirming the denial of the motion to intervene, **[*13]** the Court observed that the appellant "does not claim that it did not have actual notice." Monticello, 310 S.W.2d at 274.

In the case at bar, Appellant does not deny that it had actual notice of the foreclosure action and judicial sale well before it moved to intervene, yet it sat on this knowledge and did nothing to protect its interest for more than a year. Moreover, during that time, the

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[7] *Arnold* additionally recognized that "[w]hile the rule does not forbid post judgment intervention, it is broadly within the discretion of the trial judge whether to allow a party to intervene at that stage." Arnold, 62 S.W.3d at 369.

subject property was sold to a third party, which would seem to generally militate against intervention in this type of case. Based on these facts, we agree with the circuit court that allowing intervention would have been inequitable and unjustified. We further note that Appellee's mortgage lien indisputably had priority over Appellant's. Given that the subject property was sold for less than the amount needed to pay Appellee's mortgage, it could not reasonably be found that Appellant was prejudiced by the sale, especially in light of its delay in taking action. *See* *Jones v. Chipps, 296 Ky. 245, 248, 176 S.W.2d 408, 410 (1943)*.

In **[*14]** sum, we hold that the Greenup Circuit Court did not abuse its discretion in denying Appellant's motion to intervene as untimely. Therefore, the order of the circuit court to that effect is affirmed.

VANMETER, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

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Farmers & Traders Bank v. Ashbrook

Court of Appeals of Kentucky

March 23, 2012, Rendered

NO. 2010-CA-002213-MR

Reporter
2012 Ky. App. Unpub. LEXIS 243 *; 2012 WL 996687

FARMERS AND TRADERS BANK, APPELLANT v. APRIL ASHBROOK and RICHARD ASHBROOK, APPELLEES

Notice: THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, *CR 76.28(4)(C)*, THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Prior History: [*1] APPEAL FROM WOLFE CIRCUIT COURT. HONORABLE LARRY MILLER, JUDGE. ACTION NO. 08-CI-00102.

Core Terms

intervene, airplane, dissolution, contingent, purported, contest, impair, impede

Counsel: BRIEF FOR APPELLANT: David H. Steele, Florence, Kentucky.

BRIEF FOR APPELLEE: APRIL ASHBROOK, Melissa C. Howard, Jackson, Kentucky.

Judges: BEFORE: CLAYTON, MOORE, AND NICKELL, JUDGES. All Concur.

Opinion by: MOORE

Opinion

AFFIRMING

MOORE, JUDGE: April and Richard Ashbrook filed this action in Wolfe Family Court on April 17, 2008, to dissolve their marriage. During the pendency of this action, Farmers and Traders Bank filed a motion to intervene in an attempt to assert a lien over all of the Ashbrooks' real, personal, marital and non-marital property. As its basis for intervening, Farmers asserted that it had obtained a judgment against Richard in Powell Circuit Court relating to a loan it had given Richard for the purchase of an airplane and that it anticipated that a sale of its collateral for that loan—the airplane—might not satisfy the entire balance of its judgment. Therefore, Farmers might be entitled to a deficiency judgment and lien against any other property that the Ashbrooks held.

No party contested Farmers' assertion that it had obtained a judgment against Richard in Powell Circuit Court, but Farmers produced nothing **[*2]** below demonstrating the substance, nature, or amount of its judgment. Moreover, the Ashbrooks both argued that Farmers' purported judgment only entitled Farmers to execute a lien against Richard's property in the event that Farmers sold Richard's airplane, credited its judgment against Richard with the proceeds, and filed an affidavit with the Powell Circuit Court reciting the amount of that credit and the remaining balance due. Farmers did not contest the Ashbrooks' argument or indicate that it had complied with those terms.

After considering these arguments, the family court determined that allowing Farmers to intervene would prejudice the interests of the parties. It entered the following order, stating in relevant part:

> Farmers and Traders Bank's motion to intervene is denied. The bank may proceed to sell the airplane pursuant to the order entered in Powell Circuit Court case No. 09-CI-336 to see if it satisfies the lien/judgment.

Thereafter, Farmers timely appealed.

An order denying a motion to intervene as a matter of right is immediately appealable. *Carter v. Smith, 170 S.W.3d 402, 407 (Ky. App. 2004)*. Our standard of review as to whether intervention should have been granted is **[*3]** a clearly erroneous standard. *Id. at 409* (citing *Gayner v. Packaging Serv. Corp. of Ky., 636 S.W.2d 658, 660 (Ky. App. 1982)*).

The rule governing intervention as a matter of right is *Kentucky Rule of Civil Procedure (CR) 24.01*. *Subsection (1)* of that Rule, which is relevant to the case at bar, states:

> Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

On appeal, Farmers does not claim that it had a statutory right to intervene in the Ashbrooks' dissolution under *subsection (1)(a)*, but instead claims a right to intervene under *subsection (1)(b)*. In *Carter, 170 S.W.3d at 407*, we noted that *CR 24.01(1)(b)* requires the petitioner to meet four factors in order to intervene as a matter of right: (1) its motion must be timely; (2) the petitioner must have an interest relating **[*4]** to the subject of the action; (3) the petitioner's ability to protect its interest may be impaired or impeded, and (4) none of the existing parties could adequately represent the petitioner's interests. Importantly, it is the burden of the petitioner to prove each of these requirements. *Id. at 409*.

Here, our analysis begins and ends with the second of these factors. It was Farmers' burden to prove that it had a present and substantial interest relating to the subject of the Ashbrooks' dissolution action. To that effect, it has produced nothing demonstrating the substance, nature, or amount of its judgment against Richard; it does not disagree with or attempt to disprove the Ashbrooks' representation that Farmers' judgment precludes it from asserting any lien over Richard's property unless and until the proceeds realized from a prospective sale of Richard's airplane fail to satisfy its purported judgment; nor, for that matter, does Farmers represent that it has filed an affidavit with the Powell Circuit Court reflecting the outstanding balance of Richard's judgment credited against the value of the airplane. Therefore, Farmers' interest in any of Richard's property is, at best, contingent. **[*5]** And, a petitioner with only a contingent interest in property is not entitled, per *CR 24.01(1)(b)*, to intervene in an action. *See Baker v. Webb, 127 S.W.3d 622, 624 (Ky. 2004)* (citing *Gayner, 636 S.W.2d at 659*)). For this reason, the Judgment of the Wolfe Family Court is hereby AFFIRMED.

ALL CONCUR.

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Ken Jordan & Ken Jordan Contrs., LLC v. Hibbeln

Court of Appeals of Kentucky

November 22, 2019, Rendered

NO. 2019-CA-000310-MR

Reporter
2019 Ky. App. Unpub. LEXIS 832 *; 2019 WL 6248320

KEN JORDAN AND KEN JORDAN CONTRACTORS, LLC, APPELLANTS v. GARY HIBBELN, APPELLEE

Prior History: [*1] APPEAL FROM JEFFERSON CIRCUIT COURT. HONORABLE OLU A. STEVENS, JUDGE. ACTION NO. 13-CI-004376.

Jordan v. Hibbeln, 2018 Ky. App. Unpub. LEXIS 430 (Ky. Ct. App., June 22, 2018)

Core Terms

vacate, non-speculative, post-judgment

Counsel: BRIEFS FOR APPELLANTS: J. Fox DeMoisey, Louisville, Kentucky.

BRIEF FOR APPELLEE: Robert Anthony Florio, Louisville, Kentucky.

Judges: BEFORE: JONES, KRAMER, AND TAYLOR, JUDGES. ALL CONCUR.

Opinion by: KRAMER

Opinion

VACATING AND REMANDING

KRAMER, JUDGE: Ken Jordan and Ken Jordan Contractors, LLC (collectively "Jordan") appeal from the Jefferson Circuit Court's judgment after a bench trial awarding $45,000 in compensatory damages to Gary Hibbeln. This case was previously before this Court on the same issue: whether the damages award is supported by substantial evidence.

In our prior opinion,[1] we vacated the award as clearly erroneous and remanded for a finding either that

[1] *Jordan v. Hibbeln, No. 2016-CA-000406-MR, 2018 Ky. App. Unpub. LEXIS 430, 2018 WL 3090442 (Ky. App. June 22, 2018)*.

damages are supported by substantial evidence or are speculative. Upon review, we vacate and remand for compliance with our prior mandate, which is the law of this case concerning the damages issue.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from a breach of contract dispute, the basis of which was Jordan's alleged failure to complete some tasks — and unsatisfactory completion of others — under the parties' agreements for Jordan to renovate Hibbeln's **[*2]** house. A bench trial was held. At its conclusion, the circuit court found Jordan liable for breach of contract. Regarding the issue of damages, the circuit court found that: "[n]either party was able to testify as to the specific amount charged for each task listed," Hibbeln's expert was only able to estimate the cost of some — but not all — of the tasks, and Hibbeln's expert "acknowledged those figures were 'ballpark' estimates" at best. February 24, 2016 Order at 2.

Nevertheless, the circuit court concluded "approximately 50% of the total contemplated repairs were either not completed or not completed in a satisfactory manner. Accordingly, judgment shall be entered for the Plaintiff in the amount of $45,000 plus court costs." *Id.* An annual post-judgment interest rate of twelve percent was imposed.

Jordan subsequently filed a motion to alter, amend, or vacate the judgment, requesting, *inter alia*, that the circuit court identify how it arrived at the $45,000 damages figure and hold a hearing pursuant to *Kentucky Revised Statutes (KRS) 360.040* to modify the twelve percent post-judgment interest. The circuit court denied Jordan's motions, and Jordan appealed.

During the first appeal, this Court found "Hibbeln failed to provide **[*3]** the court with sufficient evidence to determine calculable, non-speculative damages. The lack of evidence renders the circuit court's award of $45,000 in damages erroneous." *Hibbeln, 2018 Ky. App. Unpub. LEXIS 430, 2018 WL 3090442, at *5*. Consequently, we vacated the judgment and remanded, giving the circuit court explicit direction to enter a new judgment explaining the non-speculative method used for calculating damages and the evidence supporting the award.[2]

Specifically, we directed the circuit court to determine either:

> (1) that Hibbeln failed to carry his burden of presenting non-speculative proof of his damages, or (2) that Hibbeln did carry his burden of presenting non-speculative damages, but that the [prior] judgment failed to articulate that proof in a way that would facilitate rather than frustrate appellate review.

*2018 Ky. App. Unpub. LEXIS 430, [WL] at *6*.

On remand, the circuit court entered a new judgment stating:

> The Court of Appeals ordered the Court to clarify its judgment entered on February 24, 2016. The judgment was and is in favor of [Hibbeln] in the amount of $45,000. The Court heard proof and argument. The Court determined [Hibbeln] paid [Jordan] $90,000 for reconstruction work to his home. After hearing the proof and argument, the Court determined that [Jordan] completed **[*4]** one-half of the work contemplated by the parties' contract and awarded [Hibbeln] a judgment in the amount of $45,000 representing one-half of the money paid [Jordan].

February 7, 2019 Order at 1.

Jordan filed a motion to alter, amend, or vacate the new judgment. The circuit court denied Jordan's motion. This appeal followed.

ANALYSIS

As set forth above, this Court's prior decision resolved the exact issue raised in this subsequent appeal. Accordingly, it is the law of the case.

> As the term "law of the case" is most commonly used, and as used in the present discussion unless otherwise indicated, it designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the

[2] In reference to the insufficiency of the evidence in this case, we found that "[w]ithout an itemization of the costs of the tasks listed in the proposals, and even further, a classification of what work was completed in full, completed in part, completed but not satisfactorily, or not completed at all, damages are speculative at best." *Hibbeln, 2018 Ky. App. Unpub. LEXIS 430, 2018 WL 3090442, at *6*.

mandate.

Inman v. Inman, 648 S.W.2d 847, 849 (Ky. 1982) (citation omitted). "That doctrine is the mechanism by which matters once litigated and finally determined remain so." **[*5]** *TECO Mech. Contractor, Inc. v. Kentucky Labor Cabinet, 474 S.W.3d 153, 158 (Ky. App. 2014)*.

Here, we previously held that the circuit court's damages award of $45,000 was not supported by substantial evidence and, therefore, was clearly erroneous. Under the law-of-the-case doctrine, we will not reconsider our prior decision absent new, substantially different evidence. *See Wright v. Carroll, 452 S.W.3d 127, 130 (Ky. 2014)* ("Where multiple appeals occur in the course of litigation, the law-of-the-case doctrine provides that issues decided in earlier appeals should not be revisited in subsequent ones when the evidence is substantially the same."). Thus, our review is limited to whether the circuit court properly applied our mandate.

The mandate rule, a tenet of the law-of-the-case doctrine, dictates that the circuit court was bound by our earlier opinion. The mandate rule "provides that on remand from a higher court a lower court must obey and give effect to the higher court's express or necessarily implied holdings and instructions." *Brown v. Commonwealth, 313 S.W.3d 577, 610 (Ky. 2010)* (citations omitted). In addition to serving litigants' interest in finality, the mandate rule serves "the equally important interest courts have in judicial economy, by preventing the drain on judicial resources that would result if previous decisions were routinely subject to reconsideration." **[*6]** *Id.*

In its original judgment, the circuit court failed to show its damages award was supported by substantial evidence. On remand, we directed the circuit court to articulate its reasoning or enter judgment in favor of Jordan as to damages. Instead, without expressing any alternative rationale, the circuit court entered a duplicate judgment in favor of Hibbeln "in the amount of $45,000 representing one-half of the money paid" by Hibbeln to Jordan. This was a blatant violation of the mandate rule.

In the case at bar, "[t]he mandate was plain and clear. The opinion on which it was issued is the law of this case. The circuit court has no alternative but to comply with it." *E'Town Shopping Ctr., Inc. v. Holbert, 452 S.W.2d 396, 397 (Ky. 1970)* (citations omitted). The circuit court cannot simply disregard this Court's prior mandate. On remand, the circuit court must either: (1) set forth sufficient facts to establish a reasonable, measurable damages award in favor of Hibbeln; or (2) find that Hibbeln failed to carry his burden of proving non-speculative damages.

Our ruling renders Jordan's post-judgment interest rate argument moot. However, to promote judicial economy, we will briefly address it.

Upon entering judgment, the circuit court affixed a twelve percent **[*7]** interest rate and denied Jordan's motion for reconsideration of the interest rate imposed. During the pendency of Jordan's initial appeal to this Court, *KRS 360.040* was amended.

At the time the circuit court entered its original judgment, the version of the statute in effect read:

> A judgment *shall bear twelve percent (12%) interest* compounded annually from its date. A judgment may be for the principal and accrued interest; but if rendered for accruing interest on a written obligation, it shall bear interest in accordance with the instrument reporting such accruals, whether higher or lower than twelve percent (12%). Provided, that when a claim for unliquidated damages is reduced to judgment, such judgment *may* bear less interest than twelve percent (12%) if the court rendering such judgment, after a hearing on that question, is satisfied that the rate of interest should be less than twelve percent (12%). All interested parties must have due notice of said hearing.

(Emphasis added).

The prior version of *KRS 360.040* gave circuit courts some discretion to lower the statutory interest rate on judgments for unliquidated damages if the circuit judge, "after a hearing on that question, [was] satisfied that the rate **[*8]** of interest should be less than twelve percent (12%)." "The statutory language clearly indicates that the decision to fix the post-judgment rate of interest at less than 12% is one necessarily left to the sound discretion of the trial court." *Univ. Med. Ctr., Inc. v. Beglin, 432 S.W.3d 175, 178-79 (Ky. App. 2014)*. "[A] trial court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sargent v. Shaffer, 467 S.W.3d 198, 203 (Ky. 2015)* (citing *Commonwealth v. English, 993 S.W.2d 941, 945, 46 8 Ky. L. Summary 28 (Ky. 1999))*.

Here, the circuit court did not abuse its discretion by denying Jordan's motion to lower the post-judgment

interest rate without a hearing on the issue.

CONCLUSION

For the foregoing reasons, the Jefferson Circuit Court's order is vacated. This case is remanded for further proceedings complying with this Court's mandate as stated herein.

ALL CONCUR.

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Mason v. Rockcastle Cnty. Fiscal Court

Court of Appeals of Kentucky

May 15, 2015, Rendered

NO. 2012-CA-001552-MR

Reporter
2015 Ky. App. Unpub. LEXIS 328 *; 2015 WL 2358484

GARY MASON, APPELLANT v. ROCKCASTLE COUNTY FISCAL COURT AND ROCKCASTLE COUNTY RECREATION AND WELLNESS TASKFORCE, APPELLEES

Core Terms

intervene, closure, locked, unduly, gate, timeliness, join

Counsel: BRIEF FOR APPELLANT: Gary Mason, Pro Se, Mt. Vernon, Kentucky.

BRIEF FOR APPELLEE: Adam L. Towe, London, Kentucky.

Judges: BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES. All concur.

Opinion by: JONES

Subsequent History: Decision reached on appeal by, Sub nomine at *Sheliga v. Rockcastle Cnty. Fiscal Court, 2016 Ky. App. Unpub. LEXIS 266 (Ky. Ct. App., Apr. 8, 2016)*

Prior History: [*1] APPEAL FROM ROCKCASTLE CIRCUIT COURT. HONORABLE DAVID A. TAPP, JUDGE. ACTION NO. 11-CI-00280.

Opinion

AFFIRMING

JONES, JUDGE: Gary Mason, acting without the assistance of counsel, appeals the Rockcastle Circuit Court's August 15, 2012, order denying his motion to intervene in the above-styled circuit court action. For the reasons more fully explained below, we AFFIRM.

I. Background

On or about October 24, 2011, Michael Sheliga, filed a *pro se* complaint against the Rockcastle County Fiscal Court and the Rockcastle County Recreation and Wellness Task Force (hereinafter collectively referred to as "Rockcastle County"). Sheliga's complaint alleged willful violations of open records and open meetings, violations of Kentucky Employee Retirement Systems standards, and closure of public roads, specifically Eagle Creek Road.

On June 25, 2012, the circuit court entered an order dismissing with prejudice Sheliga's claims regarding the closure of Eagle Creek Road. On July 17, 2012, Mason filed a *pro se* motion seeking to intervene as related **[*2]** to the Eagle Creek Road issue. His motion stated as follows:

> I live near Eagle Creek Road and have been using it since I was young 55 years ago. Alan Cromer and I originally complained to the Rockcastle Fiscal Court about a locked gate being placed across the road about January 2010, shortly after the gate was locked. Plaintiff in the above case is a friend and has indicated that his parents are elderly and that he intends to return to Pennsylvania in the near future to be closer to them. I am willing to pay the filing fee to pursue this matter in Appellate Court. I wish to intervene and/or join in the case in regards to the state law 178.100 relating to the locked gate being allowed to remain across Eagle Creek Road. To my knowledge, I have an "intervention of right" under civil *rule 24.01* should the current plaintiff not be able to continue with this matter. Should the current Plaintiff be able to continue with this matter , I request to be able to intervene with discretion of the court under civil *rule 24.02*. I request to be able to join the suit per civil rules 19 and 20.

Rockcastle County filed a response objecting to the proposed intervention on numerous grounds. By order entered August 15, 2012, the circuit **[*3]** court denied Mason's motion.

This appeal followed.

II. Standard of Review

We review the trial court's order related to intervention for clear error. *Carter v. Smith, 170 S.W.3d 402, 409 (Ky.App.2004)*. However, a court's evaluation of the timeliness of a motion to intervene is reviewed under an abuse of discretion standard. *Id. at 408*.

III. Analysis

Mason sought to intervene both under *CR 24.01* and *CR 24.02*.

CR 24.01 provides:

> 1) Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.
>
> (2) Anyone possessing a statutory right of intervention under (1)(a) above, may move the court to intervene in a pending action and, on failure of a party to file an objection within ten (10) days to the intervention and a notice of hearing on the objection, have an order allowing the intervention without appearing in court for a hearing.

CR 24.02 provides:

> Upon timely application anyone **[*4]** may be permitted to intervene in an action: (a) when a statute confers a conditional right to intervene or (b) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Both intervention as a matter of right, *CR 24.01*, and permissive intervention, *CR 24.02*, require *timely* application. Mason's motion to intervene was filed over ten months after Sheliga filed his initial complaint against Rockcastle County. Even more problematic, however, Mason did not move to intervene until after the circuit court had entered summary judgment in favor of Rockcastle County.

"Although post-judgment intervention is not strictly forbidden, it is widely within the discretion **[*5]** of the circuit judge." *Hazel Enterprises, LLC v. Community Financial Services Bank, 382 S.W.3d 65, 68 (Ky. App. 2012)*. "Intervention after judgment may be permitted under some circumstances but the attempted intervenor has a special burden of justifying apparent lack of timeliness." *Kelly v. Marino, 358 S.W.2d 519, 521 (Ky. 1962)*.

We have closely reviewed the record. We cannot agree with Mason that the trial court abused its discretion or otherwise committed error when it refused to allow him to intervene with respect to the road closure claim. Mason waited until *after* the trial court rendered an order fully disposing of the claim at issue before moving to intervene; yet, he proffered nothing to the trial court to justify his delay. Furthermore, Mason's concerns about Sheliga's inability to pursue appeal were unsubstantiated and indeed unfounded as Sheliga did file an appeal.

Allowing Mason to have intervened in this action would have unduly prejudiced Rockcastle County who had already litigated the issue to termination with respect to Sheliga. It would have required the trial court to reopen matters that it had already put to rest and would have unduly delayed the appeal of this matter. Therefore, we conclude that the trial court acted appropriately when it denied Mason's motion to intervene.

IV. Conclusion

For the reasons **[*6]** set forth above, we affirm the Rockcastle Circuit Court.

ALL CONCUR.

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PSC of Ky. v. Shepherd

Court of Appeals of Kentucky

March 6, 2019, Rendered

NO. 2018-CA-001859-OA

Reporter
2019 Ky. App. LEXIS 31 *; 2019 WL 1087266

PUBLIC SERVICE COMMISSION OF KENTUCKY, PETITIONER v. PHILLIP J. SHEPHERD, JUDGE, FRANKLIN CIRCUIT COURT, DIV. 1, RESPONDENT AND ATTORNEY GENERAL OF KENTUCKY; METROPOLITAN HOUSING COALITION; ASSOCIATION OF COMMUNITY MINISTRIES; THE SIERRA CLUB; AND COMMUNITY ACTION COUNCIL FOR LEXINGTON-FAYETTE, BOURBON, HARRISON, AND NICHOLAS COUNTIES, INC., REAL PARTIES IN INTEREST

Subsequent History: Reversed by *Metro. Hous. Coalition v. Shepherd, 2020 Ky. Unpub. LEXIS 37 (Ky., May 28, 2020)*

Prior History: [*1] ORIGINAL ACTION ARISING FROM FRANKLIN CIRCUIT COURT. NOS. 18-CI-01115, 18-CI-01117, AND 18-CI-01129, CONSOLIDATED.

Core Terms

intervene, rate-making, consumer, interlocutory, collateral, plenary

Case Summary

Overview
HOLDINGS: [1]-Petitioner Kentucky Public Service Commission (Commission) was entitled to a writ of prohibition as to respondent trial court hearing an interlocutory appeal of the Commission's order denying real parties in interest intervention in a rate-making case because they had no such right, as they could only request intervention, under 807 Ky. Admin. *Regs 5:063*, §§ 1(1)(l)(3) and 1(1)(n)(3) and 807 Ky. Admin. Regs. 5:120, § 2(5)(c), whether to grant it under 807 Ky. Admin. Regs. 5:001, § 4(11)(b) was solely within the Commission's discretion, ordering the Commission to grant intervention interfered with the Commission's proceedings, exceeded the court's jurisdiction, and did not meet the collateral order rule, *Ky. R. Civ. P. 24.01* did not apply, as the Commission's regulation controlled, and the court had no Declaratory Judgment Act jurisdiction, so its orders were void ab initio.

Outcome
Writ granted.

LexisNexis® Headnotes

Civil Procedure > ... > Writs > Common Law Writs > Prohibition

HN1 **Common Law Writs, Prohibition**

A writ of prohibition is an extraordinary remedy. A writ of prohibition may be granted upon a showing that (1) a lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court, or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted. This statement lays out what the Kentucky Supreme Court has described as two classes of writs, one addressing claims that a lower court is proceeding without subject matter jurisdiction and one addressing claims of mere legal error.

Business & Corporate Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

Civil Procedure > Parties > Intervention > Intervention of Right

HN2 **Public Utility Commissions, Hearings & Orders**

A right to intervene does not exist in the context of the Kentucky Public Service Commission's plenary authority to regulate and investigate utilities.

Business & Corporate Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

Civil Procedure > Parties > Intervention > Intervention of Right

HN3 **Public Utility Commissions, Hearings & Orders**

When considering whether there is a right to intervene in proceedings before the Kentucky Public Service Commission, consumers in a free market economy have no right, certainly not at common law, to dictate the rate at which a seller's product or service is sold. However, American capitalism is subject to regulation as authorized by the market participants themselves — the buyers and sellers, who are citizens all. These citizens empower representatives in state and federal governments to enact legislative schemes to protect consumers against the excesses of sellers who, for various reasons, find themselves in, and are tempted to take advantage of, a superior bargaining position. One such legislative scheme is Ky. Rev. Stat. Ann. ch. 278.

Civil Procedure > Parties > Intervention > Intervention of Right

Energy & Utilities Law > Regulators > Public Utility Commissions > Ratemaking Procedures

HN4 **Intervention, Intervention of Right**

When considering whether there is a right to intervene in proceedings before the Kentucky Public Service Commission, Ky. Rev. Stat. Ann. ch. 278 does not solve the utilities marketplace imbalance by empowering consumers with a statutory right to set their own utility rates. Through representatives, the people created the Public Service Commission (Commission) and granted it exclusive jurisdiction over the regulation of rates and service of utilities. *Ky. Rev. Stat. Ann. § 278.040(2)*. The legislature has seen to it that the Commission has the plenary authority to regulate and investigate utilities and to ensure that rates charged are fair, just, and reasonable under *Ky. Rev. Stat. Ann. §§ 278.030* and *278.040*. In fact, it was the intention of the legislature to clothe the Public Service Commission with complete control over rates and services of utilities. In summary, rather than granting consumer rights that did not exist at common law, the legislative scheme focuses on the other side of the transaction and suppresses the free market right of a utility to charge any rate the market will bear. In place of that suppressed right, the legislation still allows rate increases, but requires notice to the Commission and Commission approval. *Ky. Rev. Stat. Ann. § 278.180*.

Energy & Utilities Law > Regulators > Public Utility Commissions > Ratemaking Procedures

HN5[] Public Utility Commissions, Ratemaking Procedures

The Kentucky Public Service Commission's (Commission) plenary rate-making authority is considerable. It is primarily a legislative function of the state, and the right is essentially a police power. That power is exercised when the Commission finds that any rate is unjust, unreasonable, insufficient, unjustly discriminatory or otherwise in violation of any of the provisions of Ky. Rev. Stat. Ann. ch. 278, at which time the Commission shall by order prescribe a just and reasonable rate to be followed in the future. Ky. Rev. Stat. Ann. § 278.270. Replacing consumers' inferior negotiating position with this police power means consumers of public utilities must rely on the Commission to protect them from unreasonable and unfair rates. There is, of course, a tradeoff. The legislative scheme not only strips consumers of the right to price shop, it limits consumer participation in rate-making to two possibilities: (1) any person may present a complaint to the Commission in an attempt to initiate a case, Ky. Rev. Stat. Ann. § 278.260, and (2) a person who wishes to become a party to a case already before the Commission may, by timely motion, request leave to intervene. 807 Ky. Admin. Regs. 5:001, § 4(11)(a).

Business & Corporate Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

Energy & Utilities Law > Regulators > Public Utility Commissions > Ratemaking Procedures

HN6[] Public Utility Commissions, Hearings & Orders

Any person (broadly defined by Ky. Rev. Stat. Ann. § 278.010(2)) may present to the Kentucky Public Service Commission (Commission) a complaint in writing against any utility regarding any rate in which the complainant is directly interested. Ky. Rev. Stat. Ann. § 278.260(1). The statutes make no distinction between formal and informal complaints, but the regulations do. Compare 807 Ky. Admin. Regs. 5:001, § 20 (Formal Complaints) with 807 Ky. Admin. Regs. 5:001, § 21 (Informal Complaints). The complaint need not be about a utility rate — applicable to all utility customers — but may be of a private nature and only between the complainant and the utility. Either way, the Commission entertains the complaint. But the legislation granting consumers the right to complain to the Public Service Commission guarantees nothing else.

Business & Corporate Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

HN7[] Public Utility Commissions, Hearings & Orders

The complaint provisions of Ky. Rev. Stat. Ann. ch. 278, Ky. Rev. Stat. Ann. §§ 278.260, 278.270, and 278.280, do not mandate that a complaint to the Kentucky Public Service Commission (Commission) compels a general rate case under Ky. Rev. Stat. Ann. § 278.190. It has always been so. If a single complaint could compel Commission action, the Commission would be subjected to the whims and imaginative grievances of customers to such an extent that it would be so annoying that the intent and purpose of the law would be virtually destroyed, and the service to the general public would be thwarted if not destroyed. The Commission upon its own motion may hear and determine the complaint of an individual but the act establishing the Commission's precursor does not make it obligatory that it do so. It remains the prerogative of the Commission to initiate a rate case. Ky. Rev. Stat. Ann. § 278.190(1). Furthermore, a complainant has no right to a hearing. Hearings are not necessarily required to resolve the complaint. The Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest or for the protection of substantial rights. Ky. Rev. Stat. Ann. § 278.260(2).

Energy & Utilities Law > ... > Public Utility Commissions > Hearings & Orders > Judicial Review

HN8[] Hearings & Orders, Judicial Review

The legislative scheme does not provide for judicial review of the Kentucky Public Service Commission's (Commission) dismissal of a complaint. A single subscriber does not have an inherent right to adjudicate a controversy over rates and services in court, even though he or she is deprived by statute of the right to be heard by the Public Service Commission (Commission).

Judicial review is available only to a party to a Commission proceeding or any utility affected by an order of the Commission. Ky. Rev. Stat. Ann. § 278.410(1). A person whose complaint is dismissed never becomes a party before the Commission and, therefore, is entitled to no judicial review pursuant to Ky. Rev. Stat. Ann. § 278.410.

Business & Corporate
Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

Energy & Utilities Law > ... > Public Utility Commissions > Hearings & Orders > Judicial Review

HN9 **Public Utility Commissions, Hearings & Orders**

There are two ways for a complainant to qualify as a party to a Kentucky Public Service Commission (Commission) proceeding and thus be entitled to claim the right to judicial review under Ky. Rev. Stat. Ann. § 278.410. Both are effectively discretionary with the Commission. First, the complaint must be a formal complaint as defined by 807 Ky. Admin. Regs. 5:001, § 20, and it must initiate action that prompts the Commission's exercise of its discretionary authority under Ky. Rev. Stat. Ann. §§ 278.190, 278.270, or 278.280 to investigate, conduct a hearing, and issue an order. 807 Ky. Admin. Regs. 5:001, § 1(10)(a); Ky. Rev. Stat. Ann. §§ 278.190, 278.270, 278.280. In such a case, the complainant typically becomes a party and, pursuant to Ky. Rev. Stat. Ann. § 278.410, is granted judicial review if sought. Of course, the Commission can still exclude the complainant as a party by acting upon its own motion under those same statutes. Ky. Rev. Stat. Ann. §§ 278.190, 278.270, 278.280. Second, any complainant is a party if joined to a Commission proceeding by order of the Commission. 807 Ky. Admin. Regs. 5:001, § 1(10)(e). Again, changing the status of a person from complainant to party under 807 Ky. Admin. Regs. 5.001, § 1(10)(e) is the prerogative of the Commission.

Business & Corporate
Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

HN10 **Public Utility Commissions, Hearings & Orders**

A person becomes more than a complainant before the Kentucky Public Service Commission (Commission), rising to the status as a party, only at the discretion of the Commission. This legislative grant of discretion is emblematic of the plenary nature of the Commission's authority.

Business & Corporate
Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

Civil Procedure > Parties > Intervention

Energy & Utilities Law > Regulators > Public Utility Commissions > Consumer Advocates

Energy & Utilities Law > Regulators > Public Utility Commissions > Ratemaking Procedures

HN11 **Public Utility Commissions, Hearings & Orders**

Underlying concepts explaining why a complainant before the Kentucky Public Service Commission (Commission) cannot demand participation in a Commission proceeding have equal applicability to would-be intervenors. Although addressed by other statutes and regulations, participation by intervention in the Commission's rate-making proceedings, as with participation by complainants, is at the Commission's discretion. There is one exception to this general statement regarding the Commission's discretion in matters of intervention. It is an exception that proves the rule. The legislature has expressly and unequivocally granted to the Kentucky Attorney General the right to be made a real party in interest to any action on behalf of consumer interests involving a quasi-judicial or rate-making proceeding whenever deemed necessary and advisable in the consumers' interest by the Attorney General. Ky. Rev. Stat. Ann. § 367.150(8)(b). Whether the Attorney General intervenes is his or her decision and entirely beyond the control of the Commission because the legislature has said so.

Business & Corporate
Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

Civil Procedure > Parties > Intervention

HN12[] Public Utility Commissions, Hearings & Orders

Two references to intervention in Ky. Rev. Stat. Ann. ch. 278 shed no light at all on the entryway to intervention in Kentucky Public Service Commission (Commission) proceedings. The first says only that a person the Commission has already allowed to intervene shall have access to data a utility presents. A second addresses the possibility that a person who was not a party before the Commission may intervene in a trial court during an appeal properly brought pursuant to Ky. Rev. Stat. Ann. § 278.410.

Business & Corporate Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

Civil Procedure > Parties > Intervention

HN13[] Public Utility Commissions, Hearings & Orders

The language the legislature has chosen to describe the pathway to intervene in a Kentucky Public Service Commission (Commission) proceeding underscores that intervention is at the discretion of the Commission. The relevant statutes state only that a person may request intervention, or may be granted leave to intervene, or, in the case of an applicant desiring to erect a cellular antenna tower, contiguous property owners shall be informed of the opportunity to intervene in the Commission proceedings on the application. Each of these is another way of saying what is expressly stated in another statute — that a person may intervene in accordance with Commission administrative regulations.

Business & Corporate Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

Civil Procedure > Parties > Intervention

HN14[] Public Utility Commissions, Hearings & Orders

The legislature has authorized the Kentucky Public Service Commission (Commission) to adopt, in keeping with Ky. Rev. Stat. Ann. ch. 13A, reasonable regulations to implement the provisions of Ky. Rev. Stat. Ann. ch. 278. Ky. Rev. Stat. Ann. § 278.040(3). That includes rules for intervening. Ky. Rev. Stat. Ann. ch. 13A authorized the Commission to promulgate regulations prescribing the procedures to be utilized by the administrative body in the conduct of hearings by or for the administrative body. Ky. Rev. Stat. Ann. § 13A.100(4). The Commission has not adopted the Kentucky Rules of Civil Procedure. Instead, it has promulgated *807 Ky. Admin. Regs. 5:001*, entitled "Rules of procedure." That regulation states what persons Kentucky law considers a party for purposes of Ky. Rev. Stat. Ann. § 278.410, granting them the right to judicial review of Commission orders. That regulation also states the rules for intervention in a Commission proceeding.

Business & Corporate Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

Civil Procedure > Parties

Energy & Utilities Law > ... > Public Utility Commissions > Hearings & Orders > Judicial Review

HN15[] Public Utility Commissions, Hearings & Orders

The legislature has left to the Kentucky Public Service Commission (Commission) to define who it considers a "party" to its proceedings. This is significant because, other than an affected utility, one must be a "party" to be entitled to judicial review of any Commission order. Ky. Rev. Stat. Ann. § 278.410(1). Pursuant to the Commission's regulation, in part, "party" means a person who is granted leave to intervene pursuant to 807 Ky. Admin. Regs. 5:001, § 4(11). 807 Ky. Admin. Regs. 5:001, § 1(10)(d).

Business & Corporate Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

Civil Procedure > Parties > Intervention

HN16[] Public Utility Commissions, Hearings & Orders

Intervention in proceedings before the Kentucky Public Service Commission (Commission) is governed by the Commission's regulations, and there are standards in 807 Ky. Admin. Regs. 5:001, § 4(11).

Business & Corporate Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

Civil Procedure > Parties > Intervention > Intervention of Right

HN17 **Public Utility Commissions, Hearings & Orders**

When considering intervention in proceedings before the Kentucky Public Service Commission (Commission), the only mandate imposed upon the Commission — a mandate it has imposed upon itself by promulgating a regulation — is that it "shall grant" intervention if it finds a would-be intervenor's special interest in the case is not otherwise adequately represented or that his or her intervention is likely to present issues or to develop facts that assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. 807 Ky. Admin. Regs. 5:110, § 4(2).

Civil Procedure > Parties > Intervention

Energy & Utilities Law > Regulators > Public Utility Commissions > Ratemaking Procedures

HN18 **Parties, Intervention**

A person who is neither an original party nor a utility has no more than a right to request intervention in Kentucky Public Service Commission (Commission) proceedings. 807 Ky. Admin. Regs. 5:063, §§ 1(1)(l)(3), 1(1)(n)(3); 807 Ky. Admin. Regs. 5:120, § 2(5)(c). Legislation grants no matter-of-right intervention. Whether the circumstances set out in 807 Ky. Admin. *Regs 5:001*, § 4(11)(b) are present, a matter solely within the Commission's discretion to determine, has more to do with the Commission's effectual management of its own proceedings than with a right to intervene. Intervention is discretionary with the Commission. Assessing whether the legislature's procedure for public participation in rate-making cases is a wise decision is not a court's role. Courts need not inquire into the wisdom of legislative procedures, unless they are tainted by malice, fraud or corruption. Courts are primarily concerned with the product and not with the motive or method which produced it. Injunctive relief pursuant to *Ky. Rev. Stat. Ann. § 278.410(3)* is limited to what is provided by law.

Civil Procedure > Remedies > Injunctions

Energy & Utilities Law > Regulators > Public Utility Commissions > Ratemaking Procedures

HN19 **Remedies, Injunctions**

The Franklin, Ky., Circuit Court may grant injunctive relief in Kentucky Public Service Commission ratemaking cases only in the manner and upon the terms, "provided by law." It is significant that the legislature has used the phrase "provided by law". It has not written "according to the principles of equity jurisprudence". There is a unified and symmetrical scheme for the exercise of the legislative power of ratemaking. The legislature did not, by the use of such restrictive language, intend to open up the area for discretionary relief granted upon comparatively nebulous and generous equitable principles. The legislative mandate directs courts to keep their judicial fingers out of the ratemaking pie except to the degree that the constitutions require judicial intervention.

Administrative Law > Judicial Review > Remedies > Mandamus

HN20 **Remedies, Mandamus**

Mandamus is not an appropriate remedy to tell an administrative body how to decide or to interfere with its exercise of discretion.

Administrative Law > Judicial Review > Remedies > Mandamus

Civil Procedure > Parties > Intervention

HN21 **Remedies, Mandamus**

Kentucky jurisprudence only authorizes judicial intervention in agency matters to exercise the remedy of mandamus to grant intervention where the agency is

obviously acting without jurisdiction as a matter of law or acting contrary to the Constitution, and intervention is necessary to avoid irreparable harm or injury.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Governments > Police Powers

HN22[] Procedural Due Process, Scope of Protection

The due process clause does not restrict the state's reasonable exercise of its police power in furtherance of the public interest, even though such laws may interfere with contractual relations and commercial freedoms of private parties.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN23[] Procedural Due Process, Scope of Protection

Procedural due process is not a static concept, but calls for such procedural protections as the particular situation may demand.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

HN24[] Procedural Due Process, Scope of Protection

The right to utility service is not inherent, nor is it a natural right. This right is not the same as a person's rights to life, liberty, or property. A consumer's right to utility service comes to him or her by virtue of the law. He or she is a member of society and his or her rights must be consistent with society as a whole. While every man or woman is entitled under Ky. Const. § 14 to a remedy by due course of law, in any event, the question is always as to the nature and extent of that right. The law defines and regulates his or her rights and prescribes the remedy for him or her before the Kentucky Public Service Commission (Commission), which is a remedy by due course of law when appeal to the courts is given. The right to utility service under the common law is subject to change by the legislature. When certain conditions exist, the legislature may, through the Commission, set up the manner and method of the regulation of utility service and may authorize the Commission to hear evidence, fix and establish regulations, charges, rates, and services to be rendered to subscribers of the general public. The courts cannot compel or control the exercise of legislative functions within constitutional limitations. The legislative right to establish agencies, such as commissions, has never been questioned.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN25[] Equal Protection, Nature & Scope of Protection

Nothing in the statutory scheme regarding the provision of utility service deprives a consumer of his or her life, liberty, and property without due process of law, nor is he or she deprived of the equal protection of the law, as provided by U.S. Const. amend. XIV, § 1.

Business & Corporate Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

Civil Procedure > Parties > Intervention

HN26[] Public Utility Commissions, Hearings & Orders

The collateral order rule has limited application to that small class of orders which finally determine claims of

right separable from, and collateral to, rights asserted in an action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The rule is inapplicable when there is no claim of right to be had. Furthermore, a denial of intervention in proceedings before the Kentucky Public Service Commission fails the collateral order test which disallows appeal from any decision which is tentative, informal or incomplete.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

HN27 **Reviewability, Reviewable Agency Action**

The effect of judicial review prior to final agency action is likely to be interference with the proper functioning of the agency and a burden for the courts. Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary.

Business & Corporate Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

Civil Procedure > Parties > Intervention > Intervention of Right

HN28 **Public Utility Commissions, Hearings & Orders**

Ky. R. Civ. P. 24.01 sets out the bases upon which intervention shall be permitted as a matter of right in court actions. Even if *Ky. R. Civ. P. 24.01* applies to proceedings before the Kentucky Public Service Commission (which it does not), there is no intervention as a matter of right.

Administrative Law > Judicial Review > Remedies > Declaratory Judgments

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Discretionary Jurisdiction

HN29 **Remedies, Declaratory Judgments**

A declaratory judgment proceeding is not entertained for the determination of procedural rules, or the declaration of the substantive rights involved in a pending suit. Such decisions and declarations must be made in the first instance by the court whose power is invoked and which is competent to decide them. This principle applies, and the action is dismissed on jurisdictional grounds, where the question is within the jurisdiction of an administrative agency.

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN30 **Jurisdiction, Subject Matter Jurisdiction**

An order or judgment entered by a court without subject matter jurisdiction is void ab initio. A void judgment is not entitled to any respect or deference by the courts. It is a legal nullity, and a court has no discretion in determining whether it should be set aside. In addition, because subject matter jurisdiction concerns the very nature and origins of a court's power to act at all, it cannot be born of waiver, consent or estoppel.

Counsel: FOR PETITIONER: John E.B. Pinney, Nancy J. Vinsel, Frankfort, Kentucky.

FOR REAL PARTY IN INTEREST, ATTORNEY GENERAL OF KENTUCKY: Andy Beshear, Attorney General, Kent A. Chandler, Rebecca W. Goodman, Lawrence W. Cook, Justin M. McNeil, Assistant Attorneys General, Frankfort, Kentucky.

FOR REAL PARTY IN INTEREST, SIERRA CLUB: Joe F. Childers, Jr., Lexington, Kentucky; Iris Skidmore, Frankfort, Kentucky.

FOR REAL PARTIES IN INTEREST, METROPOLITAN

HOUSING COALITION; ASSOCIATION OF COMMUNITY MINISTRIES; AND COMMUNITY ACTION COUNCIL FOR LEXINGTON-FAYETTE, BOURBON, HARRISON, AND NICHOLAS COUNTIES, INC.: Tom FitzGerald, Frankfort, Kentucky; Lisa Kilkelly, Eileen Ordover, Louisville, Kentucky.

Judges: BEFORE: ACREE, JONES, AND KRAMER, JUDGES. ALL CONCUR.

Opinion by: Glenn E. Acree

Opinion

OPINION AND ORDER GRANTING PETITION FOR WRIT OF PROHIBITION

ACREE, JUDGE: This matter comes before the Court on the Kentucky Public Service Commission's Petition for a Writ of Prohibition pursuant to *CR*[1] *81* and *CR 76.36*. The Commission argues the circuit court lacked subject matter jurisdiction to entertain an interlocutory appeal of its decision **[*2]** not to permit intervention by certain persons in a rate-making case. We are persuaded by that argument. Having reviewed the petition and responses, and being otherwise sufficiently advised, the Petition for a Writ of Prohibition is hereby GRANTED.

I. BACKGROUND

This case began when Louisville Gas & Electric Company ("LG&E") and Kentucky Utilities ("KU") filed rate adjustment applications with the Commission. Numerous persons moved to intervene in the administrative proceedings, including: the Metropolitan Housing Coalition ("MHC"), which represents the concerns of low-income ratepayers in the Louisville area; the Association of Community Ministries ("ACM"), which provides utility assistance to low-income individuals in the Louisville area; the Sierra Club, a conservation group; and the Community Action Council for Lexington-Fayette, Bourbon, Harrison and Nicholas Counties ("CAC"), which provides energy assistance to low-income residents in KU's service area. The Commission denied motions to intervene filed by these parties; they became the real parties in interest before the circuit court ("Real Parties").

In denying intervention, the Commission found as to each of the Real Parties that **[*3]** their interests were already adequately represented by a party to the proceeding, including the Kentucky Attorney General whose office intervened as a matter of right pursuant to *KRS*[2] *367.150(8)(b)*. Still, each order denying intervention included language that, despite their non-party status in the administrative proceeding, each Real Party would "have ample opportunity to participate" by viewing all filings online, "filing comments as frequently as they choose" to be made a part of the record, and working with the Attorney General to provide testimony. Additionally, each denial stated: "if a formal evidentiary hearing is held, [Real Parties] will be provided an opportunity to present any information that they wish for the Commission's consideration in this matter."

Desiring more than this limited participation, the Real Parties claimed a right under *KRS 278.410* to an interlocutory appeal of the denial of leave to intervene. They filed civil actions (now consolidated) in the Franklin Circuit Court. On November 21, 2018, the circuit court entered a temporary injunction pursuant to *CR 65.04* enjoining the Commission from preventing the Real Parties from "full[y] participat[ing] in the two underlying rate cases to which they **[*4]** have sought intervention," and "ORDERED [the Commission] to permit [Real Parties] participation as intervening parties under *807 KAR*[3] *5:001, Section 4(11)*[.]" On December 17, 2018, the Commission filed with this Court its Petition for a Writ of Prohibition, and the Real Parties filed responses.

II. STANDARD FOR REVIEW OF WRIT PETITIONS

HN1[↑] A writ of prohibition is an extraordinary remedy. As the Supreme Court of Kentucky described the standard for granting a writ:

> A writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is

[1] Kentucky Rules of Civil Procedure.

[2] Kentucky Revised Statutes.

[3] Kentucky Administrative Regulations.

> about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004). "This statement lays out what [the Supreme Court] described as two classes of writs, one addressing claims that the lower court is proceeding without subject matter jurisdiction and one addressing claims of mere legal error." Collins v. Braden, 384 S.W.3d 154, 158 (Ky. 2012). The Commission seeks a writ of the first class, asserting the circuit court **[*5]** is acting without subject matter jurisdiction.

III. BASIS OF CIRCUIT COURT EXERCISE OF JURISDICTION

The circuit court claimed appellate jurisdiction in this case, stating "that the Commission's orders denying the Motions to Intervene are final and appealable as to these [Real Parties], and these orders may be properly presented to the [Circuit] Court at this time under KRS 278.410 and the Declaratory Judgment Act, KRS Chapter 418." (Opinion and Order entered November 21, 2018, at 7).

Relying on the definition of a "final or appealable judgment" found in *CR 54.01*, the circuit court said, "there are no remaining issues for the Commission to decide as to MHC, ACM, CAC, and the Sierra Club." (*Id.* at 7-8). The circuit court ruled as a matter of law that, "In cases where the Commission's action regarding certain litigants is, as a practical matter, a final disposition of their right to participate in the proceedings, the statute clearly authorizes immediate judicial review. KRS 278.410." (*Id.* at 8).

Cobbling together elements upon which to assert interlocutory appellate jurisdiction from an administrative proceeding, the court noted that "[a]lthough the Commission has not adopted the Kentucky Rules of Civil Procedure, the plaintiffs plainly satisfy the **[*6]** standard for intervention as a matter of right under CR 24, which is highly persuasive to the Court on this point." (*Id.*). The court went further, "tak[ing] notice of the collateral order doctrine, an exception to the final judgment rule in federal courts . . . [that] permits a court to hear interlocutory appeals of matters separable from and collateral to the rights asserted in the underlying action when those issues are 'too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." (*Id.*).

IV. ANALYSIS

We conclude the circuit court's reasoning for its exercise of interlocutory appellate jurisdiction is flawed. Not only is reliance on the Kentucky Rules of Civil Procedure misplaced, the circumstances of this case do not support application of the collateral order rule.

However, the fundamental error in the circuit court's analysis is its presumption that the Real Parties have a right to intervene in the Commission's proceedings. We conclude such **HN2**[↑] a right does not exist in the context of the Commission's "plenary authority to regulate and investigate utilities . . . ." Kentucky Public Service Comm'n v. Commonwealth ex rel. Conway, 324 S.W.3d 373, 383 (Ky. 2010).

HN3[↑] Consumers in a free market **[*7]** economy have no right, certainly not at common law, to dictate the rate at which a seller's product or service is sold. However, American capitalism is subject to regulation as authorized by the market participants themselves — the buyers and sellers, who are citizens all. These citizens empower representatives in state and federal governments to enact legislative schemes to protect consumers against the excesses of sellers who, for various reasons, find themselves in, and are tempted to take advantage of, a superior bargaining position. One such legislative scheme is KRS Chapter 278.

HN4[↑] Chapter 278 did not solve the utilities marketplace imbalance by empowering consumers with a statutory right to set their own utility rates. Through representatives, the people created the Public Service Commission and granted it "exclusive jurisdiction over the regulation of rates and service of utilities . . . ." KRS 278.040(2). The legislature saw to it that "the [Commission] had the *plenary authority* to regulate and investigate utilities and to ensure that rates charged are fair, just, and reasonable under KRS 278.030 and KRS 278.040." Commonwealth ex rel. Conway, 324 S.W.3d at 383 (emphasis added). In fact, "it was the intention of the Legislature to clothe the Public Service Commission with **[*8]** complete control over rates and services of the utilities . . . ." Southern Bell Tel. & Tel. Co. v. City of

Louisville, 265 Ky. 286, 96 S.W.2d 695, 697 (1936). In summary, rather than *granting* consumer rights that did not exist at common law, the legislative scheme focuses on the other side of the transaction and *suppresses* the free market right of a utility to charge any rate the market will bear. In place of that suppressed right, the legislation still allows rate increases, but requires notice to the Commission and Commission approval. KRS 278.180.

HN5[↑] The Commission's plenary rate-making authority is considerable. It "is primarily a legislative function of the state, and the right is essentially a police power." Southern Bell, 96 S.W.2d at 697. That power is exercised when the commission "finds that any rate is unjust, unreasonable, insufficient, unjustly discriminatory or otherwise in violation of any of the provisions of this chapter, [at which time] the commission shall by order prescribe a just and reasonable rate to be followed in the future." KRS 278.270.

Replacing the consumers' inferior negotiating position with this police power means "[c]onsumers of public utilities must rely on the Commission to protect them from unreasonable and unfair rates." Kentucky Industrial Utility Customers, Inc. v. Kentucky Public Service Commission, 504 S.W.3d 695, 705 (Ky. App. 2016). There is, of course, a tradeoff. The legislative scheme not only "strips **[*9]** consumers of the right to price shop[,]" *id.*, it limits consumer participation in rate-making to two possibilities: (1) any person may present a complaint to the Commission in an attempt to initiate a case, KRS 278.260; and (2) "[a] person who wishes to become a party to a case [already] before the commission may, by timely motion, request leave to intervene." *807 KAR 5:001 Section 4(11)(a)*.

The Real Parties do not claim the right to judicial review pursuant to KRS 278.410 as persons who became parties after filing complaints. *807 KAR 5:001 Section 1(10)(a)*. However, understanding how one becomes a party to Commission proceedings, generally, facilitates our explanation why persons denied intervention, specifically, are not parties entitled to judicial review.

HN6[↑] Any person (broadly defined by KRS 278.010(2)) may present to the Commission "a complaint in writing . . . against any utility . . . [regarding] any rate in which the complainant is directly interested . . . ." KRS 278.260(1). The statutes make no distinction between formal and informal complaints, but the regulations do. *Compare 807 KAR 5:001 Section 20* (Formal Complaints) *with 807 KAR 5:001 Section 21* (Informal Complaints). The complaint need not be about a utility *rate* — applicable to all utility customers — but might be of a private nature and only between the complainant and **[*10]** the utility.[4] Either way, the Commission will entertain the complaint. But the legislation granting consumers the right to complain to the Public Service Commission guarantees nothing else.

HN7[↑] The complaint "provisions of KRS Chapter 278, KRS 278.260, KRS 278.270 and KRS 278.280, . . . do not mandate that a complaint compels a general rate case under KRS 278.190." Commonwealth ex rel. Conway, 324 S.W.3d at 378-79 (footnotes omitted). It has always been so. As our highest court long ago said, if a single complaint could compel Commission action, "the commission would be subjected to the whims and imaginative grievances of customers to such an extent that it would be so annoying that the intent and purpose of the law would be virtually destroyed, and the service to the general public would be thwarted if not destroyed." Smith v. Southern Bell Tel. & Tel. Co., 268 Ky. 421, 104 S.W.2d 961, 963 (1937). "The commission upon its own motion might hear and determine the complaint of an individual but the act [establishing the Commission's precursor] does not make it obligatory that it do so." Louisville Gas & Elec. Co. v. Dulworth, 279 Ky. 309, 130 S.W.2d 753, 755 (1939). It remains the prerogative of the Commission to initiate a rate case. KRS 278.190(1) ("the commission *may*, upon its own motion, or upon complaint as provided in KRS 278.260, and upon reasonable notice, hold a hearing" concerning utility rates (emphasis added)).

Furthermore, a complainant has no right to a hearing. **[*11]** "Hearings are not necessarily required to resolve the complaint." Commonwealth ex rel. Conway, 324 S.W.3d at 379. "The commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest or for the protection of substantial rights." KRS 278.260(2).

HN8[↑] Nor does the legislative scheme provide for judicial review of the Commission's dismissal of a complaint. "[A] single subscriber does not have an inherent right to adjudicate a controversy over rates and

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[4] When the nature of the complaint "is of private concern to these parties [consumer and utility] . . . , jurisdiction is not exclusive with the Public Service Commission, and the case should be submitted to the court." Bee's Old Reliable Shows, Inc. v. Kentucky Power Co., 334 S.W.2d 765, 767 (Ky. 1960).

services in court, even though he is deprived by statute of the right to be heard by the Public Service Commission." *Bee's Old Reliable Shows, Inc. v. Kentucky Power Co., 334 S.W.2d 765, 766 (Ky. 1960)* (citing *Smith, 268 Ky. 421, 104 S.W.2d 961*). Judicial review is available only to a "*party* to a commission proceeding or any utility affected by an order of the commission . . . ." *KRS 278.410(1)* (emphasis added). A person whose complaint is dismissed never becomes a party before the Commission and, therefore, is entitled to no judicial review pursuant to *KRS 278.410*.

HN9[↑] There are two ways for a complainant to qualify as a party to a Commission proceeding and thus be entitled to claim the right to judicial review under *KRS 278.410*. Both are effectively discretionary with the Commission. First, the complaint must be a "formal complaint" as defined by *807 KAR 5:001 Section 20*, and it must "[i]nitiate[] action" that prompts **[*12]** the Commission's exercise of its discretionary authority under *KRS 278.190*, *KRS 278.270*, or *KRS 278.280* to investigate, conduct a hearing, and issue an order. *807 KAR 5:001 Section 1(10)(a)*; *KRS 278.190*, *.270*, and *.280*. In such a case, the complainant would typically become a party and, pursuant to *KRS 278.410*, would be granted judicial review if sought. Of course, the Commission can still exclude the complainant as a party by acting "upon its own motion" under those same statutes. *KRS 278.190*, *.270*, *.280*; *Smith, 104 S.W.2d at 963* (If "any single subscriber had a real and substantial ground or reason for complaint, the act authorizes the commission, of its own motion, . . . to correct any unreasonable situation . . . .").

Second, any complainant would be a party if "joined to a commission proceeding" by order of the Commission. *807 KAR 5:001 Section 1(10)(e)*. Again, changing the status of a person from complainant to party under the regulation's Section 1(10)(e) is the prerogative of the Commission.

In summary, ***HN10***[↑] a person becomes more than a complainant, rising to the status as a party, only at the discretion of the Commission. This legislative grant of discretion is emblematic of the plenary nature of the Commission's authority.

These ***HN11***[↑] underlying concepts explaining why a complainant cannot demand participation in a Commission proceeding have equal applicability **[*13]** to would-be intervenors. Although addressed by other statutes and regulations, participation by intervention in the Commission's rate-making proceedings, as with participation by complainants, is at the Commission's discretion.

There is one exception to this general statement regarding the Commission's discretion in matters of intervention. It is an exception that proves the rule. The legislature expressly and unequivocally granted to the Kentucky Attorney General the right to "[t]o be made a real party in interest to any action on behalf of consumer interests involving a quasijudicial or rate-making proceeding . . . whenever deemed necessary and advisable in the consumers' interest by the Attorney General." *KRS 367.150(8)(b)*. Whether the Attorney General intervenes is his decision and entirely beyond the control of the Commission because the legislature said so. Exercising power under this statute, the Attorney General did, in fact, intervene on behalf of consumer interests in this rate-making case. But the Real Parties can point to no legislation granting them a similar right to intervene.

Certainly, the legislature knows how to use language that leaves no doubt about a person's right to intervene **[*14]** in a proceeding. It has done so frequently, and the most common phrasing grants intervention "as a matter of right."[5] Chapter 278 never mentions intervention as a matter of right.

HN12[↑] Two of the few references to intervention in

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[5] *KRS 5.005(3)* ("Legislative Research Commission *may intervene as a matter of right* in any action challenging the constitutionality of any legislative district created by [*KRS Chapter 5*]." (emphasis added)); *KRS 154A.110(7)* ("The [Kentucky Lottery C]orporation . . . *may intervene as of right* in any such proceeding" seeking court approval of an assignment of a right to receive payments under a prize paid in installments. (emphasis added)); *KRS 344.670(2)* ("Any aggrieved person with respect to the issues to be determined in a civil action under this section [regarding discrimination in housing] *may intervene as of right* in that civil action." (emphasis added)); *KRS 350.250(4)* ("the [Energy and Environment C]abinet, if not a party, *may intervene as a matter of right*" in actions brought pursuant to *KRS 350.250(1)*. (emphasis added)); *KRS 351.030(2)* (certain injured or affected miners and their survivors "*shall be granted the right of intervention* in the penalty phase of [any disciplinary] proceeding" against the mine operator. (emphasis added)); *KRS 353.468(4)* (in action to appoint a trustee to oversee development of severed mineral interests, the property "owner *may intervene as a matter of right* . . . ." (emphasis added)); *KRS 365.607(1)* (in action to cancel trademark, the Kentucky "Secretary [of State] . . . *shall be given the right to intervene* in the action." (emphasis added)).

Chapter 278 shed no light at all on the entryway to intervention in Commission proceedings. The first says only that a person the Commission already allowed to intervene shall have access to data the utility presents.[6] A second addresses the possibility that a person who was not a party before the Commission might intervene in the circuit court during an appeal properly brought pursuant to KRS 278.410.[7]

HN13[] The language the legislature chose to describe the pathway to intervene in a Commission proceeding underscores that intervention is at the discretion of the Commission. The relevant statutes state only that a person "may request intervention"[8]; or "may . . . be granted leave to intervene"[9]; or, in the case of an applicant desiring to erect a cellular antenna **[*15]** tower, contiguous property owners shall be "informed of the opportunity to intervene in the commission proceedings on the application."[10] Each of these is another way of saying what is expressly stated in another statute — that a person "may intervene in accordance with commission administrative regulations."[11] So, what are those regulations?

HN14[] The legislature authorized the Commission to "adopt, in keeping with KRS Chapter 13A, reasonable regulations to implement the provisions of KRS Chapter 278 . . . ." KRS 278.040(3). That includes rules for intervening. Chapter 13A authorized the Commission to promulgate regulations prescribing "[t]he procedures to be utilized by the administrative body in the conduct of hearings by or for the administrative body . . . ." KRS 13A.100(4). As the circuit court noted, the Commission did not adopt the Kentucky Rules of Civil Procedure. Instead, it promulgated *807 KAR 5:001*, entitled "Rules of procedure." That regulation is where we learn what persons Kentucky law considers a party for purposes of KRS 278.410, granting them the right to judicial review of Commission orders. It is there, too, **[*16]** that we learn the rules for intervention in a Commission proceeding.

HN15[] Although the legislature defined more than thirty of the terms used in Chapter 278 in KRS 278.010, it left to the Commission to define who it considers a "party" to its proceedings. This is significant because, other than an affected utility, one must be a "party" to be entitled to judicial review of any Commission order. KRS 278.410(1) ("Any *party* to a commission proceeding *or any utility affected* by an order of the commission may . . . bring an action against the commission in the Franklin Circuit Court . . . ." (emphasis added)).[12]

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[6] KRS 278.192(2)(c) (If the Commission permits a party to intervene in a proceeding regarding a test period for a proposed rate increase, "any intervening party in opposition to such application shall have the right to examine all data . . ." relating to the test period.).

[7] KRS 278.420(2) (regarding timing for designating a record "after the [circuit] court enters an order permitting any other party to intervene in the action" on appeal from the Commission pursuant to KRS 278.410).

[8] KRS 278.020(9) ("In a proceeding on an application filed pursuant to this section [regarding construction of electric transmission lines], any interested person, including a person over whose property the proposed transmission line will cross, *may request intervention* . . . ." (emphasis added)).

[9] KRS 278.712(4) ("Any interested person . . . *may*, upon motion to the [Kentucky State B]oard [on Electric Generation and Transmission Siting], *be granted leave to intervene* as a party to a [local] proceeding held pursuant to this section" regarding construction of a merchant electric generating facility. (emphasis added)).

[10] KRS 278.665(2) (upon application for a certificate to construct a cellular antenna tower outside the jurisdiction of a planning commission, "the [Public Service C]ommission shall require that every person who owns property contiguous to the property where the proposed cellular antenna tower will be located [be] informed of the *opportunity to intervene* in the commission proceedings on the application." (emphasis added)).

[11] KRS 278.543(5) (regarding complaints against "any . . . telephone utility [adopting a price regulation plan] . . . . The commission may dismiss any complaint without a hearing . . . ," although it cannot issue any order without a hearing. "A person *may intervene in accordance with commission administrative regulations*." (emphasis added)).

[12] The Real Parties in Interest argue the Commission never raised the argument that would-be intervenors who are denied intervention are not "parties" for purposes of KRS 278.410 and they claim, in fact, that the Commission's position "implies the opposite." (Response of Sierra Club, p. 17 n.16). Therefore, they assert that this Court "need not reach the question . . . ." (*Id.*). We decline the invitation to ignore the requirements of KRS 278.410. Whether the circuit court could entertain an interlocutory administrative appeal brought pursuant to that statute by persons denied party status raises an issue of subject matter jurisdiction. Subject matter jurisdiction either exists at the outset of a case or does not, and any error related to it cannot be waived. Commonwealth v. Steadman, 411 S.W.3d 717, 722 (Ky. 2013) (cited in Malone v. Commonwealth, 2015-SC-000699-MR, 2018 Ky. Unpub.

Pursuant to the Commission's regulation, in relevant part, "'Party' means a person who . . . [i]s granted leave to intervene pursuant to Section 4(11) of this administrative regulation . . . ." *807 KAR 5:001 Section 1(10)(d)*. This Court's review should be as simple as concluding that the Real Parties were not granted leave to intervene; therefore, they were not parties empowered by the legislature with the right to challenge any Commission order. When the circuit court entertained the lawsuit by the Real Parties, it could not claim subject matter jurisdiction pursuant to *KRS 278.410*. But that cannot end our analysis.

The Real Parties claim **[*17]** there are restrictions placed upon the Commission's authority to deny intervention. To be sure, ***HN16***[↑] intervention is governed by the Commission's regulations and there are standards. The relevant part of the regulations states as follows:

> (11) Intervention and parties.
>
> (a) A person who wishes to become a party to a case before the commission may, by timely motion, *request leave to intervene*.
>
> 1. The motion shall include the movant's full name, mailing address, and electronic mail address and shall state his or her interest in the case and how intervention is likely to present issues or develop facts that will assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings.
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> 2. The motion may include a request by movant for delivery of commission orders by United States mail and shall state how good cause exists for that means of delivery to movant.
>
> (b) The commission *shall grant* a person leave to intervene *if the commission finds* that he or she has made a *timely motion* for intervention *and that he or she has a special interest in the case that is not otherwise adequately represented or* that *his or her intervention is likely to present issues or to **[*18]** develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings*.
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> . . . .
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> (e) A person who the commission has not granted leave to intervene in a case may file written comments regarding the subject matter of the case.
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> 1. These comments shall be filed in the case record.
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> 2. A person filing written comments *shall not be deemed a party to the proceeding* and need not be named as a party to an appeal.

807 KAR 5:001 Section 4(11) (emphasis added); *see also 807 KAR 5:110 section 4*.[13]

HN17[↑] The only mandate imposed upon the Commission — a mandate it imposed upon itself by promulgating the regulation **[*19]** — is that it "shall grant" intervention if it finds a would-be intervenor's special interest in the case "is not otherwise adequately represented or that his or her intervention is likely to present issues or to develop facts that assist the commission in fully considering the matter without unduly complicating or disrupting the proceedings." As to each of the Real Parties, the Commission failed to find such circumstances as would have compelled it to grant intervention.

HN18[↑] We conclude that a person who is neither an original party nor a utility has no more than a "right *to request* intervention" in Commission proceedings. *807 KAR 5:063 Section 1(1)(l)3* (emphasis added); *807 KAR 5:063 Section 1(1)(n)3*; *807 KAR 5:120 Section 2(5)(c)* ("interested persons have the right *to request* to intervene"). Contrary to the conclusion of the Franklin Circuit Court, the legislation grants no matter-of-right intervention. Whether the circumstances set out in *807 KAR 5:001 Section 4(11)(b)* are present, a matter solely within the Commission's discretion to determine, has more to do with the Commission's effectual

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*LEXIS 14, 2018 WL 897085, at *3 (Ky. Feb. 15, 2018))*.

[13] ***807 KAR 5:110***. Board proceedings, Section 4, is entitled, Intervention and Parties, and states:

> (1) A person who wishes to become a party to the proceeding before the board may, by written motion filed no later than thirty (30) days after the application [to construct a carbon dioxide transmission pipeline, merchant electricity generating plant, or nonregulated electric transmission line] has been submitted, request leave to intervene.
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> (2) A motion to intervene shall be granted if the movant has shown:
>
> (a) That he has a special interest in the proceeding; or
>
> (b) That his participation in the proceeding will assist the board in reaching its decision and would not unduly interrupt the proceeding.

management of its own proceedings than with a right to intervene. Intervention is discretionary with the Commission.

Assessing whether the legislature's procedure for public participation in rate-making cases **[*20]** is a wise decision is not our role. Nothing has changed since we said "that courts need not inquire into the wisdom of legislative procedures, unless they are tainted by malice, fraud or corruption. We are primarily concerned with the product and *not with* the motive *or method* which produced it." *National-Southwire Aluminum Co. v. Big Rivers Elec. Corp., 785 S.W.2d 503, 515 (Ky. App. 1990)* (emphasis added). Nor has anything changed since our Supreme Court pointed out that injunctive relief pursuant to *KRS 278.410(3)* is limited to what is "*provided by law*." Discussing an actual final order of the Commission and not an interlocutory ruling denying intervention, the Court said:

> ***HN19***[] [T]he Franklin Circuit Court . . . may grant injunctive relief only in the manner and upon the terms, "provided by law."
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> It is significant that the legislature used the phrase "provided by law". It did not write "according to the principles of equity jurisprudence". The Chapter presents a unified and symmetrical scheme for the exercise of the legislative power of ratemaking. We do not believe that the legislature, by the use of such restrictive language, intended to open up the area for discretionary relief granted upon comparatively nebulous and generous equitable principles. We read the legislative mandate as directing **[*21]** us to keep our judicial fingers out of the ratemaking pie except to the degree that the constitutions require our intervention.

Commonwealth ex rel. Stephens v. South Central Bell Tel. Co., 545 S.W.2d 927, 931 (Ky. 1976).

When the circuit court ordered the Commission to grant intervention to the Real Parties, it effectively violated the principle that ***HN20***[] "[m]andamus is . . . not an appropriate remedy to tell the . . . administrative body how to decide or to interfere with its exercise of discretion." *Humana of Kentucky, Inc. v. NKC Hosps., Inc., 751 S.W.2d 369, 374 (Ky. 1988)*. Here, the circuit court told the Commission how to decide questions solely within that administrative body's lawful purview — whether the Real Parties' interests were or were not already "adequately represented" and whether their participation would or would not "unduly complicat[e] or disrupt[] the proceedings." *807 KAR 5:001 Section 4(11)(b)*. ***HN21***[] Our jurisprudence only authorizes that kind of "judicial intervention in agency matters . . . where the agency is obviously acting without jurisdiction as a matter of law or acting contrary to the constitution . . . [and] intervention is necessary to avoid irreparable harm or injury." *Kentucky Personnel Bd. v. Elkins ex rel. Kentucky State Police, 723 S.W.2d 877, 879 (Ky. App. 1986)*. The Commission was acting within its jurisdiction and consistently with our constitutions. And yet, without such justification, the circuit court intervened and interfered in the Commission's **[*22]** proceedings.

This is not a case in which a failure of due process deprived the Real Parties of a right. They have no right at stake. *Bee's Old Reliable Shows, 334 S.W.2d at 766* ("limitation [on individual participation in Commission proceedings] was not in violation of the Constitution, and . . . deprives no one of his rights"); *Smith, 104 S.W.2d at 964* (There is no constitutional, statutory, regulatory, or common law right to utility service.).[14]

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[14] A more complete discussion of the concept that no right is at stake here is as follow:

> ***HN24***[] The right to [utility] service is not inherent, nor is it a natural right. This right is not the same as his rights to life, liberty, or property. [A consumer's] right to [utility] service comes to him by virtue of the law. He is a member of society and his rights must be consistent with society as a whole. . . . While every man is entitled under section 14 of the Constitution to a remedy by due course of law, in any event, the question is always as to the nature and extent of that right. The law defines and regulates his rights and prescribes the remedy for him before the commission, which is a remedy by due course of law when appeal to the courts is given. The right to [utility] service under the common law is subject to change by the Legislature. When certain conditions exist, the Legislature may, through the commission, set up the manner and method of the regulation of the [utility] service . . . and may authorize the commission to hear evidence, fix and establish regulations, charges, rates, and services to be rendered to subscribers of the **[*24]** general public. The courts cannot compel or control the exercise of legislative functions within constitutional limitations. The legislative right to establish agencies, such as commissions, has never been questioned. . . .
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> ***HN25***[] We see nothing in this act [the precursor to Chapter 278] that deprives [the consumer] of his life, liberty, and property without due process of law, nor is he deprived of the equal protection of the law, as provided by section 1 of Amendment 14 of the Constitution of the United States.

HN22[] "The due process clause does not restrict the state's reasonable exercise of its police power in furtherance of the public interest, even though such laws may interfere with contractual relations and commercial freedoms of private parties." Kentucky Cent. Life Ins. Co. v. Stephens, 897 S.W.2d 583, 590, 42 05 Ky. L. Summary 37 (Ky. 1995) (citation omitted). As this rate case proceeds, it may well affect the contractual relations between the Real Parties (or those they represent) and the utilities. But that is the very nature of the legislature's exercise of police power here in furtherance of the public interest. *See* Smith v. O'Dea, 939 S.W.2d 353, 358, 44 3 Ky. L. Summary 4 (Ky. App. 1997) ("Administrative tribunals in particular have been permitted to fashion procedures appropriate to their functions."). HN23[] To the extent procedural due process is a factor, we repeat that it "is not a static concept, but calls for such procedural protections as the particular situation may demand." Kentucky Cent. Life Ins., 897 S.W.2d at 590. The process **[*23]** that was due the Real Parties is that set out in the statutes and regulations governing proceedings before the Commission. Those statutes and regulations were followed.

There is also the complicating factor that the Real Parties sought and obtained this judicial intervention before the Commission could complete its rate-making proceedings. Enticed by the allure of HN26[] the "collateral order rule," the circuit court embraced it despite acknowledging its limited application to "that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Commonwealth v. Farmer, 423 S.W.3d 690, 696 (Ky. 2014) (quoting Mitchell v. Forsyth, 472 U.S. 511, 524-25, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949))). The rule is inapplicable here because there is no "claim of right" to be had. Furthermore, denial of intervention fails the collateral **[*25]** order test "which 'disallow[s] appeal from any decision which is tentative, informal or incomplete.'" Swint v. Chambers County Comm'n, 514 U.S. 35, 42, 115 S.Ct. 1203, 1208, 131 L.Ed.2d 60 (1995) (quoting Cohen, 337 U.S. at 546, and citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978) ("order denying class certification held not appealable under collateral order doctrine, in part because such an order is 'subject to revision in the District Court'"). The Commission created a regulation, *807 KAR 5:001 Section 4(11)(e)*, granting the Real Parties the right to continued, albeit limited, participation — something not available under our court rules of procedure. That continued participation allows the Commission, as it moves the rate-making process forward, to reconsider whether its interlocutory denial of intervention deprives it of a perspective inadequately represented by existing parties. If it deems the interlocutory denial to have been a mistake, it can correct it.

Under substantively similar circumstances, the collateral order rule was not applied in F.T.C. v. Standard Oil Co. of California, 449 U.S. 232, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980). In that case, the Supreme Court of the United States reversed a lower court's order interfering with the conduct of an administrative agency's proceedings, in what was effectively the appeal of the agency's interlocutory decision. Expressing concepts equally applicable here, the high court said:

> HN27[] the effect of the judicial **[*26]** review sought [prior to final agency action] is likely to be interference with the proper functioning of the agency and a burden for the courts. Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. [Citation omitted]. Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary.

Id., 449 U.S. at 242, 101 S.Ct. at 494; *see also* Stephens v. Kentucky Utilities Co., 569 S.W.2d 155, 158 (Ky. 1978) ("[p]ublic policy dictates that these [rate setting] actions [before the Commission] not be unnecessarily prolonged."). We conclude similarly that this judicial intervention, unjustified by common law, regulation, statute, or Constitution, interfered with the Commission's statutorily granted plenary authority to engage in rate-making.

And unlike the circuit court, we find *CR 24.01* neither "highly persuasive" nor applicable. To the extent the Real Parties urge the rule upon this Court, we answer simply that our highest court rejected that notion long ago when:

> Appellants suggest[ed] that the spirit of *CR 24.01*

Smith, 104 S.W.2d at 964.

> should be applied, whether the civil rules may be thought to pertain to administrative bodies or not. ***HN28***[⬆] *CR 24.01* sets out the bases upon which **[*27]** intervention shall be permitted as a matter of right in court actions. A short answer to the contention is that even if *CR 24.01* applied to proceedings before the Commission (which it does not) there is still no showing of intervention as a matter of right.

Inter-County Rural Elec. Co-op. Corp. v. Public Service Commission, 407 S.W.2d 127, 130 (Ky. 1966). That holding applies here.

Each of the parties cites two unpublished opinions of this Court having no precedential value. They select portions of each to support their respective positions. We do the same. *Young v. Pub. Serv. Comm'n of Kentucky, No. 2009-CA-000292-MR, 2010 Ky. App. Unpub. LEXIS 897, 2010 WL 4739964, at *2 (Ky. App. Nov. 24, 2010)* ("Having determined that the appeals were interlocutory, the court then properly found it had no jurisdiction over them"); *EnviroPower, LLC v. Pub. Serv. Comm'n of Kentucky, No. 2005-CA-001792-MR, 2007 Ky. App. Unpub. LEXIS 121, 2007 WL 289328, at *3 (Ky. App. Feb. 2, 2007)* ("Under this regulation, the [Commission] retains the power in its discretion to grant or deny a motion for intervention").

The circuit court further determined it had jurisdiction under the *Declaratory Judgment Act, KRS Chapter 418*. We disagree.

> ***HN29***[⬆] A declaratory judgment proceeding will not be entertained for the determination of the procedural rules, or the declaration of the substantive rights involved in a pending suit. Such decisions and declarations must be made in the first instance by the court whose power is invoked and which is competent to decide them. *This principle has been applied, and the action dismissed on jurisdictional* ***[*28]*** *grounds, where the question was within the jurisdiction of an administrative agency*.

Pritchett v. Marshall, 375 S.W.2d 253, 257 (Ky. 1963) (emphasis added) (citation and internal quotation marks omitted).

In summary, the circuit court entered orders without subject matter jurisdiction. ***HN30***[⬆] An order or judgment entered by a court without subject matter jurisdiction is void *ab initio. See Covington Trust Co. of Covington v. Owens, 278 Ky. 695, 129 S.W.2d 186, 190 (Ky. 1939)*; *Wagner v. Peoples Bldg. & Loan Ass'n, 292 Ky. 691, 167 S.W.2d 825, 826 (Ky. 1943)*; *Commonwealth Health Corp. v. Croslin, 920 S.W.2d 46, 48, 43 4 Ky. L. Summary 20 (Ky. 1996)*; *20 Am.Jur.2d Courts § 65* at 380. A void judgment is not entitled to any respect or deference by the courts. *Mathews v. Mathews, 731 S.W.2d 832, 833 (Ky. App. 1987)*. It is "a legal nullity, and a court has no discretion in determining whether it should be set aside." *Foremost Ins. Co. v. Whitaker, 892 S.W.2d 607, 610, 42 2 Ky. L. Summary 15 (Ky. App. 1995)*. In addition, because subject matter jurisdiction concerns the very nature and origins of a court's power to act at all, it "cannot be born of waiver, consent or estoppel[.]" *Nordike v. Nordike, 231 S.W.3d 733, 738 (Ky. 2007)* (internal quotation marks and citation omitted).

The circuit court has jurisdiction to enter but one order in this case — an order dismissing for lack of subject matter jurisdiction. All other orders entered in this action — past, present, or future — are void *ab initio. S.J.L.S. v. T.L.S., 265 S.W.3d 804, 833 (Ky. App. 2008)*.

V. CONCLUSION

WHEREFORE, the petition for a Writ of Prohibition is GRANTED.

ALL CONCUR.

Entered: March 6, 2019

/s/ Glenn E. Acree

JUDGE, COURT OF APPEALS

End of Document

Overstreet v. Mayberry

Supreme Court of Kentucky

July 9, 2020, Rendered

2019-SC-000041-TG AND 2019-SC-00042-TG

Reporter
2020 Ky. LEXIS 225 *

RANDY OVERSTREET; BOBBY D. HENSON; WILLIAM S. COOK; TIMOTHY LONGMEYER; THOMAS ELLIOTT; JENNIFER ELLIOTT; AND, VINCE LANG, APPELLANTS v. JEFFREY C. MAYBERRY, AS MEMBER AND BENEFICIARY OF TRUST FUNDS ON BEHALF OF THE KENTUCKY RETIREMENT SYSTEMS, AND AS TAXPAYER ON BEHALF OF THE COMMONWEALTH OF KENTUCKY; HONORABLE BRANDY O. BROWN, AS MEMBER AND BENEFICIARY OF TRUST FUNDS ON BEHALF OF THE KENTUCKY RETIREMENT SYSTEMS, AND AS TAXPAYER ON BEHALF OF THE COMMONWEALTH OF KENTUCKY; MARTHA MICHELLE MILLER, AS MEMBER AND BENEFICIARY OF TRUST FUNDS ON BEHALF OF THE KENTUCKY RETIREMENT SYSTEMS, AND AS TAXPAYER ON BEHALF OF THE COMMONWEALTH OF KENTUCKY; STEVE ROBERTS, AS MEMBER AND BENEFICIARY OF TRUST FUNDS ON BEHALF OF THE KENTUCKY RETIREMENT SYSTEMS, AND AS TAXPAYER ON BEHALF OF THE COMMONWEALTH OF KENTUCKY; TERESA STEWART, AS MEMBER AND BENEFICIARY OF TRUST FUNDS ON BEHALF OF THE KENTUCKY RETIREMENT SYSTEMS, AND AS TAXPAYER ON BEHALF OF THE COMMONWEALTH OF KENTUCKY; JASON LAINHART, AS MEMBER AND BENEFICIARY OF TRUST FUNDS ON BEHALF OF THE KENTUCKY RETIREMENT SYSTEMS, AND AS TAXPAYER ON BEHALF OF THE COMMONWEALTH OF KENTUCKY; DON. D. COOMER, AS MEMBER AND BENEFICIARY OF TRUST FUNDS ON BEHALF OF THE KENTUCKY RETIREMENT SYSTEMS, AND AS TAXPAYER ON BEHALF OF THE COMMONWEALTH OF KENTUCKY; BEN WYMAN, AS MEMBER AND BENEFICIARY OF TRUST FUNDS ON BEHALF OF THE KENTUCKY RETIREMENT SYSTEMS, AND AS TAXPAYER ON BEHALF OF THE COMMONWEALTH OF KENTUCKY; KKR & CO. L.P.; HENRY R. KRAVIS; GEORGE R. ROBERTS; PRISMA CAPITAL PARTNERS LP; PACIFIC ALTERNATIVE ASSET MANAGEMENT COMPANY, LLC; GIRISH REDDY; JANE BUCHAN; BLACKSTONE GROUP, L.P.; BLACKSTONE ALTERNATIVE ASSET MANAGEMENT COMPANY, L.P.; STEVEN A. SCHARZMAN; J. TOMILSON HILL; R.V. KUHNS & ASSOCIATES, INC.; REBECCA A. GRATSINGER; JIM VOYTKO; ICE MILLER, LLP; CAVANAUGH MACDONALD CONSULTING, LLC; THOMAS J. CAVANAUGH; TODD B. GREEN; ALISA BENNETT; GOVERNMENT FINANCE OFFICERS ASSOCIATION; KENTUCKY RETIREMENT SYSTEMS; DAVID PEDEN; BRENT ALDRIDGE; T. J. CARLSON; AND, WILLIAM A. THIELEN, APPELLEES AND BRENT ALDRIDGE; T.J. CARLSON; DAVID PEDEN; AND, WILLIAM THIELEN, APPELLANTS v. JEFFREY C. MAYBERRY AS MEMBER AND BENEFICIARY OF TRUST FUNDS ON BEHALF OF THE KENTUCKY RETIREMENT SYSTEMS, AND AS TAXPAYER ON BEHALF OF THE COMMONWEALTH OF KENTUCKY; HONORABLE BRANDY O. BROWN, AS MEMBER AND BENEFICIARY OF TRUST FUNDS ON BEHALF OF THE KENTUCKY RETIREMENT SYSTEMS, AND AS TAXPAYER ON BEHALF OF THE COMMONWEALTH OF KENTUCKY; MARTHA MICHELLE MILLER, AS MEMBER AND BENEFICIARY OF TRUST FUNDS ON BEHALF OF THE KENTUCKY RETIREMENT SYSTEMS, AND AS TAXPAYER ON BEHALF OF THE COMMONWEALTH OF KENTUCKY; STEVE ROBERTS, AS MEMBER AND BENEFICIARY OF TRUST FUNDS ON BEHALF OF THE KENTUCKY RETIREMENT SYSTEMS, AND AS TAXPAYER ON BEHALF OF THE COMMONWEALTH OF KENTUCKY; TERESA STEWART, AS MEMBER AND BENEFICIARY OF TRUST FUNDS ON BEHALF OF THE KENTUCKY RETIREMENT SYSTEMS, AND AS TAXPAYER ON BEHALF OF THE COMMONWEALTH OF KENTUCKY; JASON LAINHART, AS MEMBER AND BENEFICIARY OF TRUST FUNDS ON BEHALF OF THE KENTUCKY RETIREMENT SYSTEMS, AND AS TAXPAYER ON BEHALF OF THE COMMONWEALTH OF KENTUCKY; DON. D.

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Notice: PLEASE REFER TO THE KENTUCKY RULES REGARDING FINALITY OF OPINIONS.
TO BE PUBLISHED

Prior History: **[*1]** ON TRANSFER FROM COURT OF APPEALS CASE NO. 2019-CA-000012. FRANKLIN CIRCUIT COURT NO. 17-CI-01348. HONORABLE PHILLIP J. SHEPHERD.

ON TRANSFER FROM COURT OF APPEALS CASE NO. 2019-CA-000016. FRANKLIN CIRCUIT COURT NO. 17-CI-01348. HONORABLE PHILLIP J. SHEPHERD.

Core Terms

defined-benefit, shortfall, misconduct, fiduciary, pension, mismanagement, shareholder, termination, underfunded, retirement, ownership, concrete, default, interlocutory, actuarial, imminent, insider, vested, speculative, hedge-fund, sellers, issuer

Case Summary

Overview
HOLDINGS: [1]-Kentucky Retirement System (KRS) defined-benefit retirement plan members lacked constitutional standing to bring claims for alleged funding losses where, based on a statutorily declared inviolable contract with the Commonwealth, they continued to receive vested monthly retirement payments regardless of any alleged plan mismanagement, and there was no allegation that the Commonwealth could not cover any shortfall; [2]-The members lacked standing in a representational or derivative capacity as they did not have any personal injuries; [3]-The members lacked standing as trust beneficiaries as their rights were in the receipt of promised funds, not in the general pool of KRS assets; [4]-The members lacked standing as taxpayers as they sought relief from private third parties and KRS officials in their individual capacities, and the state Attorney General was not involved.

Outcome
Case remanded with instruction to dismiss complaint.

LexisNexis® Headnotes

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN1[] **Standing, Elements**

To establish constitutional standing under Kentucky law, a plaintiff must demonstrate (1) an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury is redressable by a ruling favorable to the plaintiff.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN2 **Appellate Jurisdiction, Interlocutory Orders**

While a trial court's ruling on the issue of constitutional standing, in and of itself, does not give rise to an immediate right to an appeal, i.e., an interlocutory appeal, the Supreme Court of Kentucky has the authority to address constitutional standing whenever a facially valid and procedurally proper interlocutory appeal is before it.

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3 **Standards of Review, De Novo Review**

Constitutional standing arguments are reviewed de novo.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN4 **Standing, Injury in Fact**

To sue in a Kentucky court the plaintiff must have the requisite constitutional standing, which is defined by three requirements: (1) injury, (2) causation, and (3) redressability.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN5 **Standing, Injury in Fact**

To establish the first standing requirement, an injury must be concrete, particularized, and actual or imminent, fairly traceable to the challenged action, and redressable by a favorable ruling. For an injury to be particularized, it must affect the plaintiff in a personal and individual way. This means the plaintiff personally has suffered some actual or threatened injury. For an injury to be concrete, it must actually exist. And while an injury may be threatened or imminent, the concept of imminence cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for constitutional standing purposes, i.e., that the injury is certainly impending. Thus, the United States Supreme Court has repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact and that allegations of possible future injury are not sufficient.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN6 **Standing, Injury in Fact**

Importantly, the requirement of an injury in fact is a hard floor of Kentucky courts' jurisdiction that cannot be set aside by courts or legislatures. So in order to claim the interests of others, the litigants themselves still must have suffered an injury in fact, thus giving them a sufficiently concrete interest in the outcome of the issue in dispute.

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN7 **Standing, Elements**

The Kentucky Constitution is interpreted to have the same justiciability requirements as the federal constitution.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN8 **Standing, Injury in Fact**

While the requirement that a shareholder maintain ownership of the shares throughout the course of litigation may serve some prudential standing purpose in that it ensures the plaintiff has an incentive to litigate the case vigorously and compatibly with the corporation's interests, it also serves the purpose of satisfying the injury-in-fact requirement of constitutional standing.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

Pensions & Benefits Law > ERISA > Civil Litigation > Standing

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN9 **Standing, Injury in Fact**

The argument for standing based on trust beneficiary status has squarely been rejected in the context of ERISA plans by federal circuits and, recently, the United States Supreme Court, because participants in a defined-benefit plan possess no equitable or property interest in the plan assets. The basic flaw in the trust-based theory of standing is that the participants in a defined-benefit plan are not similarly situated to the beneficiaries of a private trust or to the participants in a defined-contribution plan. In the private trust context, the value of the trust property and the ultimate amount of money received by the beneficiaries will typically depend on how well the trust is managed, so every penny of gain or loss is at the beneficiaries' risk. By contrast, a defined-benefit plan is more in the nature of a contract. The plan participants' benefits are fixed and will not change, regardless of how well or poorly the plan is managed. The benefits paid to the participants in a defined-benefit plan are not tied to the value of the plan. Moreover, the employer, not plan participants, receives any surplus left over after all of the benefits are paid; the employer, not plan participants, is on the hook for plan shortfalls. Plan participants possess no equitable or property interest in the plan.

Pensions & Benefits Law > ERISA > Exempt Plans > Government Plans

HN10 **Exempt Plans, Government Plans**

ERISA does not apply to government plans, including the Kentucky Retirement System.

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN11 **Standing, Particular Parties**

There are two different types of taxpayer suits: Taxpayers may have standing to sue either in their personal capacity as taxpayers or derivatively on behalf of a local governmental unit (taxpayer derivative).

Governments > State & Territorial Governments > Claims By & Against

Governments > State & Territorial Governments > Employees & Officials

HN12 **State & Territorial Governments, Claims By & Against**

Under Kentucky law, the Attorney General, as a constitutionally elected official, is empowered to represent the Commonwealth in cases in which the Commonwealth is the real party in interest. *Ky. Rev. Stat. Ann. § 15.020* provides that in the role of chief law officer of the Commonwealth of Kentucky, the Attorney General shall exercise all common law duties and authorities pertaining to the office of the Attorney General under the common law, except when modified by statutory enactment. It is unquestioned that at common law, the Attorney General had 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. This authority necessarily includes the broad powers to initiate and defend actions on behalf of the people of the Commonwealth.

Governments > State & Territorial
Governments > Employees & Officials

HN13[] **State & Territorial Governments, Employees & Officials**

Under Ky. Const. § 91, the Attorney General is an elected constitutional officer whose duties shall be prescribed by law. And the General Assembly has prescribed the Attorney General's duties and responsibilities in *Ky. Rev. Stat. Ann. § 15.020*.

Governments > State & Territorial
Governments > Employees & Officials

HN14[] **State & Territorial Governments, Employees & Officials**

As a constitutionally elected officer, the Attorney General is entrusted with broad discretion in the performance of his duties, which includes evaluating the evidence and other facts to determine whether a particular claim should be brought. And, importantly, when the Attorney General turns to outside counsel to assert claims belonging to the Commonwealth, their relationship is governed by strict statutory procurement and oversight requirements.

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Judges: OPINION OF THE COURT BY CHIEF JUSTICE MINTON. All sitting. All concur.

Opinion by: MINTON

Opinion

OPINION OF THE COURT BY CHIEF JUSTICE MINTON

REVERSING AND REMANDING

HN1[↑] To establish constitutional standing under Kentucky law, a plaintiff must demonstrate (1) an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury is redressable by a ruling favorable to the plaintiff.[1] We are asked in these consolidated appeals to determine whether eight members of the Kentucky Retirement System's (KRS's) defined-benefit retirement plan have standing to bring claims for alleged funding **[*6]** losses sustained by the KRS plan against certain former KRS trustees and officers as well as private-investment advisors and hedge funds and their principals. Because we conclude that Plaintiffs do not have an injury in fact that is concrete or particularized, they do not have the requisite standing to bring their claims. Accordingly, we reverse the circuit court's order and remand to the circuit court with direction to dismiss the complaint.

I. BACKGROUND.

Plaintiffs are eight public employees—current and retired—who are members of KRS. Because Plaintiffs began participation in KRS before January 1, 2014, their retirement plan is a defined-benefit plan under which retirees receive a fixed payment each month. Plaintiffs do not claim to have had their vested or expected retirement benefits reduced or otherwise made unavailable to them, and they are legally and contractually entitled to receive those payments, once vested, for the rest of their lives.

Plaintiffs brought this action in circuit court against eleven KRS trustees and officers in their individual capacity and against third parties **[*7]** who did business with KRS, including actuarial and investment advisors, hedge-fund sellers, and their executives.[2]

Plaintiffs allege that between 2011 and 2016 Defendants knew that KRS faced an appreciable risk of running out of plan assets but concealed the true state of affairs from KRS members and the public. Instead, Plaintiffs allege, the KRS trustees and officers attempted to "recklessly gamble" their way out of the actuarial shortfall by investing $1.5 billion of KRS plan assets in high-risk "fund-of-hedge-fund" products offered by the defendant hedge-fund sellers.[3] According to Plaintiffs, these investments ultimately lost over $100 million by 2018 and further accumulated fees "expected to measure in the hundreds of millions of dollars." These losses, according to Plaintiffs, contributed to what is now a $25 billion funding shortfall in the KRS general pool of assets.

As a result, Plaintiffs brought claims against the trustees and officers for breach of certain common-law and statutory duties owed to KRS and its members. Plaintiffs also asserted claims for breach of fiduciary duties against the advisors and hedge-fund sellers and their principals as well as claims for aiding and **[*8]** abetting the breaches of the trustees and officers. And Plaintiffs brought a claim against all Defendants for engaging in a joint enterprise or civil conspiracy to breach fiduciary duties. Plaintiffs sought monetary damages for the shortfall suffered by KRS because of the allegedly risky investments and consequent use of taxpayer funds to cover that shortfall as well as disgorgement of allegedly excessive and unjustified fees from the hedge-fund sellers. They also sought declaratory relief and injunctive relief to remove one of the trustee defendants from the KRS Board, to prohibit him from serving on the Investment Committee, and directing that any hedge-fund sellers working inside KRS be removed. Plaintiffs assert that any monetary recovery is to go to the KRS plan. But, not to be missed, Plaintiffs also seek attorneys' fees and an "incentive fee" for each of the named KRS members.

After Plaintiffs filed this action, KRS formed an "independent special litigation committee of the Board of Trustees" to investigate Plaintiffs' claims and consider whether to join the action. In a Joint Notice filed with Plaintiffs in the circuit court, KRS explained that it ultimately declined to join **[*9]** the action or itself pursue the claims but nevertheless endorsed the Plaintiffs' "pursuit of these claims on a derivative basis on KRS's behalf." And if the Plaintiffs' claims are dismissed on standing grounds, KRS explained, it reserved the right later to pursue the claims itself. In addition, Plaintiffs also provided the Attorney General an advance copy of their complaint before filing, but he declined to join the suit.

In February of 2018, Defendants moved to dismiss Plaintiffs' claims for lack of constitutional standing and, for some defendants, on immunity grounds. The circuit court denied the motion, finding, among other things,

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[1] *Cabinet for Health & Family Servs., Dep't for Medicaid Servs. v. Sexton by & through Appalachian Reg'l Healthcare, Inc., 566 S.W.3d 185, 196 (Ky. 2018)*.

[2] We refer to these parties collectively as Defendants.

[3] Plaintiffs refer to these investment vehicles as "Black Boxes."

that Plaintiffs had standing to bring their claims.

From the circuit court's order, the KRS trustee and officer defendants each filed notices of interlocutory appeal in which they challenge the circuit court's rulings on sovereign immunity and constitutional standing. This court accepted transfer of those appeals and consolidated them. Those consolidated appeals make up the present case before this Court.

Meanwhile, in January of 2019, a subset of Defendants also filed an original action in the Court of Appeals seeking a writ of prohibition claiming the **[*10]** circuit court was acting outside of its subject-matter jurisdiction. In April 2019, the Court of Appeals granted the writ of prohibition, finding that Plaintiffs lacked standing, and the Plaintiffs appealed that decision to this Court.[4] We heard oral argument in all three cases on the same day, and now render this opinion and orders adjudicating those cases simultaneously.

II. ANALYSIS.

The only issues before this Court are whether the Plaintiffs have an injury in fact sufficient to support constitutional standing as required by our recent case, *Commonwealth Cabinet for Health & Family Servs., Dep't for Medicaid Servs. v. Sexton by & through Appalachian Reg'l Healthcare, Inc.*,[5] (*Sexton*), 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.[6]

A. This Court may address constitutional standing in an interlocutory appeal that is properly before us on independent grounds.

We first clarify this Court's authority to address the issue of constitutional standing in a procedurally proper interlocutory appeal. These cases **[*11]** are before us at this juncture as interlocutory appeals from the same circuit court order denying Defendants' motion to dismiss on standing and immunity grounds.

HN2[↑] While "a trial court's ruling on the issue of constitutional standing, in and of itself, does not give rise to an immediate right to an appeal, i.e. an interlocutory appeal[,]" this Court has the authority to address constitutional standing whenever a facially valid and procedurally proper interlocutory appeal is before it.[7] In this case, the facially valid and procedurally proper interlocutory-appeal issue before us is whether the doctrine of qualified official immunity bars Plaintiffs' claims.[8] *HN3*[↑] As such, we address Defendants' constitutional standing arguments,[9] which we review de novo.[10]

B. Plaintiffs lack an injury in fact sufficient to support constitutional standing.

HN4[↑] To sue in a Kentucky court the plaintiff must have the requisite constitutional standing, which is defined by three requirements: (1) injury, (2) causation,

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[4] We refer to that case herein as the "Writ Case." In an Order of the Court rendered today, we dismiss the Writ Case as moot.

[5] *566 S.W.3d 185, 195 (Ky. 2018)*.

[6] Our dismissal of this case renders the Writ Case moot.

[7] *Sexton, 566 S.W.3d at 191-92* (holding that this Court has authority to address constitutional standing on a facially valid and procedurally proper interlocutory appeal of a lower court's ruling on sovereign immunity).

[8] *See Baker v. Fields, 543 S.W.3d 575 (Ky. 2018)* (a ruling on an immunity defense is an appealable issue by interlocutory appeal); *see also Sexton, 566 S.W.3d at 191-92* (recognizing the same).

[9] The KRS defendants argue both that Plaintiffs lack constitutional standing and that they are immune from suit in their Appellant Briefs. Curiously, however, Plaintiffs' Appellee Brief makes no substantive argument on the constitutional-standing issue but rather dedicates all 50 pages to the immunity issue. Instead, Plaintiffs "rely on their briefs in the [corresponding] writ appeal for a complete discussion regarding standing . . ." and provide a conclusory summary of the arguments contained therein. Because incorporating by reference additional pages of argument would presumably violate the 50-page brief requirement contained in ***CR 76.12(4)(b)(ii)***, we would normally be apt to strike those arguments. But because of the unique nature of this appeal—and, ultimately, because we find the Plaintiffs lack standing—we address each of the constitutional-standing arguments contained in the Plaintiffs' Writ Appeal brief.

[10] *Nash v. Campbell Cty. Fiscal Ct., 345 S.W.3d 811, 816 (Ky. 2011)* ("Issues of law are reviewed de novo by a reviewing court.")

and (3) redressability.[11]

HN5[↑] To establish the first requirement, "an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable **[*12]** ruling.'"[12] "For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way.'"[13] This means the plaintiff "personally has suffered some actual or threatened injury."[14] For an injury to be concrete, it must "actually exist."[15] And while an injury may be threatened or imminent, the concept of imminence "cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for [constitutional standing] purposes—that the injury is *certainly impending*."[16] Thus, the United States Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact' and that '[a]llegations of *possible* future injury' are not sufficient."[17]

If Plaintiffs here had not received their vested monthly pension benefits, they would certainly have the requisite injury in fact to support standing.[18] But Plaintiffs at this point *have* received and will continue to receive all their monthly pension benefits. To demonstrate standing to bring their claims, Plaintiffs assert three alternative arguments: (1) they have standing as representatives of the KRS plan, (2) they have standing as common-law beneficiaries **[*13]** of a trust, and (3) they have standing as taxpayers of the Commonwealth.

And although not briefed to this Court, Plaintiffs advanced at oral argument and in a subsequent motion filed before this Court that they *themselves* have a direct injury because the Defendants' collective actions substantially increased the risk that their benefits will be denied in the future. We start with Plaintiff's direct-injury argument and address each in turn.

i. Direct Injury to Plaintiffs.

We note first that any loss to KRS plan assets does not directly confer an injury to the Plaintiffs because they are members of a defined-benefit plan rather than a defined-contribution plan. "In a defined-benefit plan, retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions."[19] In a defined-contribution plan, by contrast, "the retirees' benefits are typically tied to the value of their accounts, and the benefits can turn on the plan fiduciaries' particular investment decisions."[20] So, any alleged mismanagement of the KRS plan has no direct

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[11] *Sexton, 566 S.W.3d at 196*.

[12] *Clapper v. Amnesty Intern. USA, 568 U.S. 398, 409, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2010)* (quoting *Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149, 130 S. Ct. 2743, 2752, 177 L. Ed. 2d 461 (2010)*).

[13] *Spokeo, Inc. v. Robins, 136 S. Ct 1540, 1548, 194 L. Ed. 2d 635 (2016)* (quoting *Lujan, 504 U.S. at 560 n. 1*).

[14] *United States v. Richardson, 418 U.S. 166, 177, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1974)*.

[15] *Spokeo, 136 S. Ct. at 1548* (quoting *Lujan, 504 U.S. at 560 n. 1*).

[16] *Clapper, 568 U.S. at 409* (quoting *Lujan, at 565, n. 2*) (internal quotations marks omitted and emphasis in original).

[17] *Id.* (quoting *Whitmore v. Arkansas, 495 U.S. 149, 158, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990))* (emphasis in original). The *Clapper* court also noted by footnote that "[o]ur cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a "substantial risk" that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Id. at 414 n. 5*. There is no allegation that Plaintiffs are required to reasonably incur costs to mitigate the risk that their benefits will be reduced or made unavailable to them in the future.

[18] *See Thole v. U.S. Bank, 140 S. Ct. 1615, 1619, 207 L. Ed. 2d 85 (2020)* ("If Thole and Smith had not received their vested pension benefits, they would of course have Article III standing to sue . . . .").

[19] *Thole, 140 S. Ct. at 1618*. *See also Evans v. Akers, 534 F.3d 65, 71 n. 5 (1st Cir. 2008)* (citing *LaRue v. DeWolff, Boberg, & Assocs., Inc., 552 U.S. 248, 255-56, 128 S. Ct. 1020, 169 L. Ed. 2d 847 (2008))* ("In contrast with a defined contribution plan, where the amount of benefits is directly related to the investment income earned in an individual account, the investment performance of the portfolio held by a defined benefit plan has no effect on the level of benefits to which a participant is entitled, provided that the plan remains solvent.").

[20] *Id.* (citing *Beck v. PACE Int'l Union, 551 U.S. 96, 98, 127 S. Ct. 2310, 168 L. Ed. 2d 1 (2007)*; *Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439-40, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999))*.

bearing on whether the KRS-member Plaintiffs in this case will **[*14]** receive their vested monthly retirement payments.[21]

Plaintiffs instead assert that the collective mismanagement of the KRS plan confers an injury in fact personal to themselves because the resulting decrease in plan assets substantially increased the risk that their retirement benefits will be denied in the future. Specifically, Plaintiffs assert that the imprudent investment decisions in question resulted in hundreds of millions of dollars in losses to the plan assets thereby placing at significant risk the solvency of the KRS fund.

But relying on any increased risk of not receiving pension benefits in the future poses a problem in this case: as KRS beneficiaries, Plaintiffs' retirement benefits are part of a statutorily declared "inviolable contract" between KRS members and the Commonwealth.[22] Should KRS become so severely underfunded that it runs out of assets and terminates, the Plaintiffs are still entitled to their pension benefits under their inviolable contract with the Commonwealth. And even before the risk of plan termination is realized, the Commonwealth has the authority to increase its own contribution to the KRS plan to make up any actuarial shortfall in its assets. **[*15]** In essence, then, the full faith and credit of the Commonwealth serves as a backstop for Plaintiffs' pension benefits even in the event that severe plan mismanagement renders KRS insolvent.

In the context of private ERISA defined-benefit pension plans, similar increased-risk standing arguments have been rejected as too speculative largely because even mismanagement that results in severe underfunding still requires the realization of several additional risks beyond plan termination before beneficiaries are denied their benefits. **[*16]** For example, in *Lee v. Verizon Communications, Inc.*,[23] the Fifth Circuit found plan participants in a private-employer defined-benefit plan lacked an injury in fact to bring a claim against plan administrators for fiduciary misconduct.[24] The plan participants had argued, in part, that they were directly harmed from the alleged plan mismanagement because the transactions in question had left the plan "in a far less stable financial condition and underfunded by almost $2 billion or only about 66% actuarially funded."[25]

But the court found this risk-based theory too speculative to support standing largely because "prior to default [in a private-employer defined-benefit plan] 'the employer typically bears the entire investment risk and—short of the consequences of plan termination—must cover any underfunding as the result of the shortfall that may occur from the plan's investments.'"[26] And even in the event the employer is unable to cover the underfunding, "the impact on participants is not certain since the PBGC[27] provides statutorily-defined protection of participants' benefits."[28] Instead, the court explained, other federal circuit courts considering the degree to which the impact of fiduciary

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[21] Plaintiffs' counsel conceded at oral argument that none of the Plaintiffs are members of the KRS "Hybrid Cash Balance Plan," which has characteristics of both a defined-benefit plan and a defined-contribution plan. That plan became available to members who began participation with KRS on or after January 1, 2014.

[22] *See* *Jones v. Bd. of Trs. of Ky. Ret. Sys., 910 S.W.2d 710, 713, 42 12 Ky. L. Summary 36 (Ky. 1995)* (recognizing that "the retirement savings system has created an inviolable contract between KERS members and the Commonwealth . . . "); *See also* *KRS 61.692(1)*, which provides the following:

> (1) For members who begin participating in the Kentucky Employees Retirement System prior to January 1, 2014, it is hereby declared that in consideration of the contributions by the members and in further consideration of benefits received by the state from the member's employment, *KRS 61.510 to 61.705* shall constitute an inviolable contract of the Commonwealth, and the benefits provided therein shall not be subject to reduction or impairment by alteration, amendment, or repeal, except:
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> (a) As provided in *KRS 6.696*; and
>
> (b) The General Assembly reserves the right to amend, reduce, or suspend any legislative changes to the provisions of *KRS 61.510 to 61.705* that become effective on or after July 1, 2018.

[23] *837 F.3d 523 (5th Cir. 2016)*

[24] *Id. at 545-48*.

[25] *Id. at 546*.

[26] *Id. at 545* (quoting *Hughes Aircraft Co., 525 U.S. at 439*).

[27] The Pension Benefit Guaranty Corporation serves as an insurance for plan termination, into which private defined-benefit plans are required to pay premiums each year. *See* *LaRue, 552 U.S. at 256*.

[28] *Lee, 837 F.3d at 545*.

misconduct **[*17]** must be realized in order to establish standing had concluded that "constitutional standing for defined-benefit plan participants requires imminent risk of default by the plan, *such that participant's benefits are adversely affected*."[29] As such, it was irrelevant whether the plan was under- or overfunded because the risk to the participants' benefits depended on the realization of several additional risks—that the employer would be unable to cover the shortfall or that the PBGC would be unable to provide the benefits—which "collectively render the injury too speculative to support standing."[30] Without credibly alleging impending plan termination *and* an inability of the employer to cover the shortfall, the participants' "allegations that the plan was underfunded, and less financially stable, merely increases the relative likelihood that [the employer] will have to cover a shortfall"—not the likelihood that the participants will not receive their benefits.[31]

A number of federal circuits have reached similar conclusions,[32] which we note is consistent with the United States Supreme Court's view that "threatened injury must be *certainly impending* to constitute injury in fact."[33] But Plaintiffs **[*18]** assert in a motion before this Court that the Supreme Court's recent decision in *Thole v. U.S. Bank*[34] "explicitly left undisturbed the rule expressed in *LaRue v. DeWolff, Boberg & Associates, Inc.*[35] that standing *does* exist where 'misconduct by the administrators of a defined benefit plan . . . creates or enhances the risk of default by the entire plan.'"[36] But neither *Thole* nor *LaRue* stands for that proposition.

Thole expressly left unaddressed this issue because "the plaintiffs' complaint did not plausibly and clearly claim that the alleged mismanagement of the plan substantially increased the risk that the plan *and the employer* would fail and be unable to pay the plaintiffs' future pension obligations."[37] The Court stated that "a bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan *and the employer would both fail*."[38] The Court did, however, suggest in a footnote that the plaintiffs might not even have standing in the event both the plan *and* employer were to fail because, in that scenario, "the PGBC would be required to pay these two plaintiffs all of their vested pension benefits in full."[39]

While *LaRue* stated that **[*19]** "misconduct by the administrators of a defined benefit plan will not affect entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan," it did so in passing, only to illustrate that the plaintiffs in that case—members of a defined-contribution plan—did not need to show that the solvency of the entire plan was

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[29] *Id. at 546* (citing *David v. Alphin, 704 F.3d 327, 338 (4th Cir. 2013)*; *Harley v. Minn. Mining & Mfg. Co., 284 F.3d 901, 906 (8th Cir. 2002)*, *Perelman v. Perelman, 919 F. Supp. 2d 512, 517-520 (E.D. Pa. 2013)*, aff'd, *793 F.3d 368 (3d Cir. 2015)*) (emphasis added).

[30] *Id. at 546*.

[31] *Id.*

[32] *See, e.g., Alphin, 704 F.3d at 338* (finding "the alleged risk to be insufficiently 'concrete and particularized' to constitute an injury-in-fact for [constitutional standing] standing purposes. If the Plan becomes underfunded, the [employer] will be required to make additional contributions. If the [employer] is unable to do so because of insolvency, participants' vested benefits are guaranteed by the PBGC up to a statutory minimum[]").

[33] *Clapper, 568 U.S. at 409* (quoting *Whitmore v. Arkansas, 495 U.S. 149, 158, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)*) (emphasis in original and internal quotations marks omitted).

[34] *140 S. Ct. 1615, 207 L. Ed. 2d 85*.

[35] *552 U.S. at 254-56*.

[36] Plaintiffs cite to *City of Louisville v. Stock Yards Bank & Trust Co., 843 S.W.2d 327 (Ky. 1992)*, as consistent with this proposition. But that case dealt with the ability of the City of Louisville, not beneficiaries, to sue for mismanagement of the Policeman's Retirement Fund of the City of Louisville. *Id. at 328*. The Court held that the City had the requisite interest to sue because not only had the City "made direct payments to the fund to maintain its fiscal soundness, it also has the additional duty, in the interest of sound public policy, to guarantee that active police officers have a dependable pension plan, one free of waste and mismanagement." *Id. at 329*. By contrast, the Court stated that "while appellees concede that fund beneficiaries may have standing, these individuals would have little motivation to bring suit secure in the knowledge that their pension benefits are guaranteed by the taxpayers of the City of Louisville." *Id.* This case deals with the standing of the latter—beneficiaries of a defined-benefit plan, not its member employers.

[37] *Thole, 140 S. Ct. at 1622* (emphasis added).

[38] *Id.* (emphasis added).

[39] *Id. at n. 2*.

threatened in order for their benefits to be reduced.[40] But even still, the *LaRue* court's statement is consistent with the *Lee* court's rule that an injury in fact will not result unless it can be shown, at least, that plan termination is imminent, and the *employer* will not be able to cover the shortfall in the event of plan default. And even further, the *LaRue* court noted immediately after this statement that the risk of plan default is what "prompted Congress to require defined benefit plans (but not defined contribution plans) to satisfy complex minimum funding requirements, and to make premium payments to the Pension Benefit Guaranty Corporation for plan termination insurance."[41] So it is not clear that even the *LaRue* court thought an injury in fact existed for defined-benefit beneficiaries in the event of plan and employer default because **[*20]** of the effect of the PBGC.[42]

But in any case, even assuming the Supreme Court would have found an injury in fact had the plaintiffs in *Thole* alleged that the employer was unable to cover any shortfall in the plan, that holding would not apply here. Plaintiffs have alleged that KRS is severely underfunded and that, at least in part, plan mismanagement is to blame. But, similar to the plaintiffs in *Lee*, Plaintiffs in this case have not alleged that the Commonwealth will be unable to cover the shortfall by increasing its contribution to the system or that, in the event of plan termination, the Commonwealth would be unable to pick up the tab directly. In sum, Plaintiffs have only alleged that the plan mismanagement increases the relative likelihood that the Commonwealth—an entity with taxing authority and the inability to avoid its obligations through bankruptcy[43]—will eventually have to fund the KRS plan's actuarial shortfall or pay Plaintiffs their benefits directly. Such an allegation is too speculative and hypothetical to confer standing for defined-benefit beneficiaries.

Relatedly, Plaintiffs also argue in passing that the statutory scheme grants to KRS participants a statutory **[*21]** right to prudent plan management and that they suffer a cognizable injury through invasion of that right by the alleged fiduciary misconduct. But this theory of standing has also repeatedly been rejected by federal circuits in the context of ERISA as conflating the concepts of statutory and constitutional standing.[44] That is, even if the KRS scheme grants to Plaintiffs a statutory right to have their plan managed in accordance with certain fiduciary standards, Plaintiffs must still themselves show a constitutional injury in fact to bring their claims. The Plaintiffs themselves do not have such an injury, so they may not bring their claims under this theory.

ii. Representative Standing.

While the alleged fiduciary misconduct is not sufficient to support a direct injury in fact on the part of Plaintiffs, they alternatively assert standing in a *representational* or *derivative* capacity on behalf of KRS and the Commonwealth.[45] While the plan may have suffered a loss of assets as a result of alleged mismanagement, such an injury is insufficient to confer standing on the part of the Plaintiffs here.

HN6[↑] Importantly, the requirement of an injury in fact is a hard floor of our courts' **[*22]** jurisdiction that cannot be set aside by courts or legislatures.[46] So in

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[40] *552 U.S. at 255*.

[41] *Id.*

[42] It is also worth noting that *Thole* cites the standing discussion in *Lee, 837 F.3d at 545-46*, as analogous authority to the risk-based standing theory.

[43] Under the ***Bankruptcy Act***, states are not persons eligible to file for bankruptcy protection. *11 U.S.C. § 109*.

[44] *See* *Lee, 837 F.3d at 546* (rejecting argument that plan beneficiaries' statutory right to proper plan management sufficed for Article III standing where participants did not themselves have a concrete stake in the suit and reiterating that the *Lujan* Court "clarified that a legislative creating of rights does not eliminate the injury requirement for a party seeking review" (citing *Lujan, 504 U.S. at 578*)); *see also* *Alphin, 704 F.3d at 338* (rejecting same argument as a "non-starter" for conflating statutory and constitutional standing).

[45] In fact, Plaintiffs First Amended Complaint conceded that they did not, themselves, have an injury in fact but were instead bringing their claims on behalf of KRS and the Commonwealth.

[46] *See* *Summers v. Earth Island Inst., 555 U.S. 488, 497, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009)* ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."). "Article III jurisdiction" refers to jurisdiction of federal courts under Article of the United States Constitution. ***HN7***[↑] Because we have interpreted the Kentucky Constitution to have the same justiciability requirements as the federal constitution, *see* *Sexton, 566 S.W.3d at 196-97* (interpreting *Ky. Const. § 112* and adopting the federal test for constitutional standing), this rule applies to

order to claim 'the interests of others, the litigants themselves still must have suffered an injury in fact, thus giving' them 'a sufficiently concrete interest in the outcome of the issue in dispute.'"[47] As such, the Supreme Court in *Thole* recently rejected this exact argument in the context of participants in an ERISA defined-benefit plan, who did not themselves have an injury in fact, asserting claims on behalf of the plan.[48] Similarly, as we concluded above, the Plaintiffs do not themselves have an injury in fact, so they cannot also assert their claims on behalf of the plan.

Plaintiffs analogize their representative claim to corporate derivative suits in which, they argue, shareholders need not show an injury personal to themselves. But that argument ignores the fact that plaintiffs in a shareholder suit have a continuing personal interest in the litigation because of their status as shareholders. The requirement that derivative plaintiffs maintain ownership of their shares in the corporation throughout the pendency of litigation is codified in both *Federal Rule of Civil Procedure 23.1* and, in Kentucky, *KRS 271B.7-400(1)*. While Plaintiffs assert this **[*23]** requirement serves only a prudential standing purpose, we believe it has constitutional-standing implications as well.

In *Gollust v. Mendell*,[49] the Supreme Court considered whether a shareholder plaintiff bringing a derivative claim under *§ 16(b) of the Securities Exchange Act of 1934* had standing even after losing ownership of his shares in the defendant company during the litigation.[50] *Section 16(b)* imposes strict liability on "insider" owners of more than ten percent of a corporation's listed stock for any profits realized from the purchase and sale of stock occurring within a six-month period.[51] The statute authorizes both issuers and "owner[s] of any security of the issuer" to bring suit on behalf of the issuer against the "insider" to recover short-swing profits—with any recovery going back to the corporation.[52]

The plaintiff in *Gollust*, a shareholder in the defendant corporation, brought suit on behalf of the corporation against an "insider" for short-swing trade profits but lost ownership of his shares in the corporation during the suit.[53] In determining whether the plaintiff had standing to continue, the Court first concluded that neither the text of the statute nor its legislative history required a **[*24]** shareholder plaintiff to maintain ownership of the stock throughout the entire litigation.[54] But the Court construed the statute to require the shareholder plaintiff to maintain ownership of the shares throughout the entire case because such a construction would both further the purpose of the statute by ensuring plaintiffs have an incentive to litigate vigorously on behalf of the corporation *and* would avoid the "serious constitutional question that would arise" from allowing a non-shareholder plaintiff to continue prosecution of the case.[55] Explaining its justification for construing the statute to have a continuous ownership requirement, the *Gollust* Court stated the following:

> Congress must, indeed, have assumed any plaintiff would maintain some continuing financial stake in the litigation for a further reason as well. For if a security holder were allowed to maintain a *§ 16(b)* action after he had lost any financial interest in its outcome, there would be serious constitutional doubt whether that plaintiff could demonstrate the standing required by Article III's case-or-controversy limitation on federal court jurisdiction.[56] Although "Congress may grant an express right of

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courts of the Commonwealth as well.

[47] *Thole, 140 S. Ct. at 1620* (quoting *Hollingsworth v. Perry, 570 U.S. 693, 708, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013)*).

[48] *See id.* (holding plaintiff-beneficiaries of a defined-benefit plan who themselves lack a cognizable injury do not have standing to sue "as representatives of the plan itself").

[49] *501 U.S. 115, 111 S. Ct. 2173, 115 L. Ed. 2d 109 (1991)*.

[50] *Id. at 117-19*.

[51] *Id. at 117*.

[52] *Id.*

[53] *Id. at 118-19*.

[54] *Id. at 124*.

[55] *Id. at 125-26*.

[56] *See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)* (Article III requires "the party requesting standing [to allege] 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues' ") (quoting *Baker v. Carr, 369 U.S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)*; *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)*.

> action to persons who **[*25]** otherwise would be barred by prudential standing rules,"[57] . . . "Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself."[58] Moreover, the plaintiff must maintain a "personal stake" in the outcome of the litigation throughout its course.[59]
>
> Hence, we have no difficulty concluding that, in the enactment of § 16(b), Congress understood and intended that, throughout the period of his participation, a plaintiff authorized to sue insiders on behalf of an issuer would have some continuing financial interest in the outcome of the litigation, both for the sake of furthering the statute's remedial purposes by ensuring that enforcing parties maintain the incentive to litigate vigorously, and to avoid the serious constitutional question that would arise from a plaintiff's loss of all financial interest in the outcome of the litigation he had begun.[606161]

As such, even though the Court recognized ownership of an issuer's security is only a "modest financial stake" in the outcome of a derivative suit, the Court nonetheless views it as necessary to satisfy constitutional standing. ***HN8***[⬆] We take from this that while the requirement that a shareholder **[*26]** maintain ownership of the shares throughout the course of litigation may serve some "prudential standing" purpose in that it ensures the plaintiff has an incentive to litigate the case vigorously and compatibly with the corporation's interests, it *also* serves the purpose of satisfying the injury-in-fact requirement of constitutional standing. And perhaps more importantly, the Court in Thole cited to Gollust as authority "suggesting that shareholder must 'maintain some continuing financial stake in the litigation' in order to have Article III standing to bring an insider trading suit on behalf of the corporation."[62]

Further, Plaintiffs argue that our recent decision in Sexton[63] allows representative suits as long as an injury can be shown on behalf of the entity or person being represented. But Sexton did not so fundamentally change the bedrock standing requirement that litigants themselves still must have suffered an injury in fact in order to claim the interests of others.

In Sexton, the plaintiff, Lettie Sexton, received medical care from a non-party hospital, Appalachian Regional Healthcare (ARH).[64] Because Sexton was a Medicaid beneficiary, ARH received reimbursement for part, but not **[*27]** all, of the cost of Sexton's care from Coventry Health and Life Insurance, a managed-care provider.[65] Specifically, Coventry had reimbursed ARH for the first 24 hours of Sexton's stay but not an extended 15-hour stay for a cardiology consultation.[66]

ARH, purporting to act as Sexton's representative, sought review of Coventry's denial of reimbursement, first administratively and then in a circuit court appeal of the administrative denial.[67] Importantly, Sexton was the named plaintiff in the lawsuit, even though ARH was seeking reimbursement for its claims associated with Sexton's 15-hour cardiology consult.[68]

After formally adopting the federal Lujan test, we held that Sexton lacked constitutional standing to bring the claim because she had not suffered an injury in fact.[69] And because Sexton—not ARH—was the named plaintiff in the case, we explained that it was Sexton's

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[57] Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206, 45 L.Ed.2d 343 (1975).

[58] *Id.*

[59] *See* United States Parole Comm'n v. Geraghty, 445 U.S. 388, 395-397, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980).

[60] *See* Crowell v. Benson, 285 U.S. 22, 62, 52 S. Ct. 285, 296, 76 L. Ed. 598 (1932) ("When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, . . . this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided"); *see also* Public Citizen v. Department of Justice, 491 U.S. 440, 465-466, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989); *id., at 481, 109 S. Ct. at 2580* (Kenndy, J., concurring in judgment).

[61] Gollust, 501 U.S. at 124-25.

[62] Thole, 140 S. Ct. at 1620.

[63] 566 S.W.3d at 195.

[64] Id. at 188.

[65] *Id.*

[66] *Id.*

[67] Id. at 188-89.

[68] Id. at 189.

[69] Id. at 196-99.

injury that mattered for purposes of constitutional standing:

> Simply stated, Sexton, by and through her authorized representative, ARH, lacks the requisite standing to sue in this case. We emphasize the crucial determinative fact—because Sexton, not ARH, is the true plaintiff in this case, we must examine the standing requirement **[*28]** through the lens of Sexton's, not ARH's, purported satisfaction.[70]

Plaintiffs now attempt to distort our holding in Sexton by asserting that the injury of the named plaintiff is irrelevant when that party is asserting the injury of another. Plaintiffs argue that because we analyzed standing through the lens of the "true plaintiff," Sexton, even though ARH was the entity asserting her claim, we must similarly analyze standing in this case from the perspective of KRS.

This misses the point. We identified Sexton as the "true plaintiff" and analyzed standing from her perspective not because ARH was attempting to assert her rights, but *because she was the plaintiff*. In this way, Sexton did not in any way change the *Lujan* constitutional analysis—we still require the actual plaintiff named in the lawsuit to show his or her own, particularized injury. Analogizing to this case, we must also analyze standing through the lens of the named plaintiffs' purported satisfaction. And the named plaintiffs are pension beneficiaries who cannot themselves show an injury in fact. As such, our decision in *Sexton* provides no support to Plaintiffs here.

Relatedly, Plaintiffs argue they are statutorily authorized **[*29]** to bring their claims on behalf of KRS and the Commonwealth under *KRS 61.645*.[71] But, again, even if that statute provides the authorization Plaintiffs claim, they must still show a concrete stake in the suit sufficient to constitute an injury in fact. This argument again conflates the concepts of constitutional and statutory standing, "and we decline to undermine this distinction by recognizing the latter as conferring the former."[72] This point is buttressed by the fact that ERISA participants are unquestionably authorized to bring suits on behalf of the plan for fiduciary misconduct under the ERISA enforcement provision, *§ 502(a)(2)*,[73] but courts repeatedly dismiss suits brought under that provision because the participants failed to show an injury particular to themselves.[74] And, for the same reason, Plaintiff's contention that their ability to sue on behalf of KRS was "both conceded and endorsed" by KRS in the Joint Notice has no effect on Plaintiffs' ability to show an injury in fact sufficient to support constitutional standing.[75]

iii. Standing as Trust Beneficiaries.

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[70] *Id. at 197*.

[71] Because Plaintiffs lack an injury in fact sufficient to confer constitutional standing, we express no opinion on whether ***KRS 61.645*** provides to KRS beneficiaries a statutory right—expressly or implicitly—to bring claims on behalf of the plan.

[72] *Lee, 837 F.3d at 546*.

[73] *§ 502(a)(2)* authorizes ERISA pension beneficiaries to bring suit on behalf of the plan, but all relief must go to the plan itself. *Alphin, 704 F.3d at 332* (citing *Loren v. Blue Cross & Blue Shield of Mich., 505 F.3d 598, 608 (6th Cir. 2007)*).

[74] *See Thole, 140 S. Ct. at 1620* ("[Participants] stress that ERISA affords the Secretary of Labor, fiduciaries, beneficiaries, and participants—including participants in a defined-benefit plan—a general cause of action to sure for restoration of plan losses and other equitable relief. See *ERISA §§ 502(a)(2)*, *(3)*, ... But the cause of action does not affect the Article III analysis."); *see also Lee, 837 F.3d at 544* ("This dispute centers not on whether [plaintiff has] statutory standing under *§ 502*, but instead whether he has constitutional standing under Article III."); *David, 704 F.3d at 343* ("It is undisputed that Appellants have statutory standing to assert claims against Appellees on behalf of the Pension Plan under *ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2)*. However, appellants asserting ERISA claims must also have constitutional standing under Article III, U.S. Const*. art. III, § 2*.").

[75] Also, while not argued by the Plaintiffs, we note that ***KRS 61.645*** does not effect an *assignment or partial assignment* of claims. Nowhere in that statute is a beneficiary given the right to collect proceeds from a lawsuit on behalf of KRS, and the Joint Notice from Kentucky lawmakers makes no such claim. This fact alone distinguishes this case from both *Sprint Communs. Co., L.P. v. APCC Servs., 554 U.S. 269, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008)*, and *Vermont Agency of Natural Res. v. U.S. ex rel Stevens, 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000)*; two cases often cited by plaintiffs bringing representative claims under ERISA but relied on a statutory assignment of claims to satisfy the injury-in-fact requirement on the part of the representative plaintiff. See *Vermont Agency, 529 U.S. at 773*; *Sprint, 554 U.S. at 286*.

Plaintiffs also argue that they have standing to pursue their claims as beneficiaries of a trust based **[*30]** on common-law trust principles. Specifically, Plaintiffs assert that the Restatement (Third) of Trusts provides that a beneficiary of a trust can sue a third party when the trustees cannot or will not do so, to the detriment of the beneficiary's interest. And they point to language in the KRS statutory scheme as recognizing that funds administered by KRS are "trust funds" and that the participants should similarly be treated as trust beneficiaries.[76]

HN9[] But this argument also has squarely been rejected in the context of ERISA plans by federal circuits[77] and, recently, the Supreme Court, because participants in a defined-benefit plan possess no equitable or property interest in the plan assets:

> The basic flaw in the plaintiffs' trust-based theory of standing is that the participants in a defined-benefit plan are not similarly situated to the beneficiaries of a private trust or to the participants in a defined-contribution plan. See *Varity Corp. v. Howe, 516 U.S. 489, 497, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996)* (trust law informs but does not control interpretation of ERISA). In the private trust context, the value of the trust property and the ultimate amount of money received by the beneficiaries will typically depend on how well **[*31]** the trust is managed, so every penny of gain or loss is at the beneficiaries' risk. By contrast, a defined-benefit plan is more in the nature of a contract. The plan participants' benefits are fixed and will not change, regardless of how well or poorly the plan is managed. The benefits paid to the participants in a defined-benefit plan are not tied to the value of the plan. Moreover, the employer, not plan participants, receives any surplus left over after all of the benefits are paid; the employer, not plan participants, is on the hook for plan shortfalls. See *Beck, 551 U.S. at 98-99, 127 S. Ct. 2310*. As this Court has stated before, plan participants possess no equitable or property interest in the plan. *See Hughes Aircraft Co., 525 U.S. at 439-441, 119 S. Ct. 755*; *see also LaRue v. DeWolff, Boberg & Associates, Inc., 552 U.S. 248, 254-256, 128 S.Ct. 1020, 169 L.Ed.2d 847 (2008)*. The trust-law analogy therefore does not fit this case and does not support Article III standing for plaintiffs who allege mismanagement of a defined-benefit plan.[78]

Similarly, Plaintiffs' benefits in this case are fixed and will not fluctuate based on the value of the KRS assets. And, moreover, Plaintiffs are not entitled to any surplus left over in the KRS fund, and the Commonwealth, not the Plaintiffs, is on the hook for plan shortfalls. Plaintiffs have identified nothing giving them an interest **[*32]** in the general pool of KRS assets, and we have previously stated that KRS beneficiaries' rights are, in essence, only "the receipt of promised funds."[79] As such, common-law trust principles also do not provide a viable theory of standing to Plaintiffs in this case.

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[76] *See KRS 61.515(2)* ("A fund, called the "Kentucky Employees Retirement Fund," which shall consist of all the assets of the system as set forth in *KRS 61.570 to 61.585*. All assets received in the fund *shall be deemed trust funds* to be held and applied solely as provided in ***KRS 61.510 to 61.705***." (emphasis added)). We note that ERISA contains similar trust language: "all assets of an employee benefit plan shall be held in trust by one or more trustees" and "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." *29 U.S.C. §§ 1103(a), (c)(1)*; *see also § 1104(a)(1)*.

[77] *See, e.g., Duncan v. Muzyn, 885 F.3d 422, 429 (6th Cir. 2018)* ("A discretionary [trust] beneficiary has an equitable interest in the trust corpus, . . . but Plaintiffs identify nothing in the Plan's rules that gives members any interest in the savings account. Rather, Plaintiffs have an interest solely in their defined benefits, not in the 'general pool' of Plan assets." (citing *Hughes Aircraft Co., 525 U.S. at 439-40, 119 S. Ct. 755*).

[78] *Thole, 140 S.Ct. at 1619-20*.

[79] *See Jones, 910 S.W.2d at 715* ("At the simplest level, appellees have the right to the pension benefits they were promised as a result of their employment, at the level promised by the Commonwealth. This right does not include oversight of every aspect of the process; its essence is the receipt of promised funds."). The circuit court, instead, stated that KRS beneficiaries have a protected property interest in the funds held by KRS, citing *Commonwealth ex rel. Armstrong v. Collins, 709 S.W.2d 437 (Ky. 1986)*. There, this Court held, "[b]ecause the General Assembly has no authority to transfer private funds to the general fund, the transfer of money from agencies in which public funds and private employee contributions are commingled and cannot be differentiated [such as KRS], is unconstitutional." *Id. at 446*. We do not view *Collins* as conflicting with the *Jones* court's conclusion that the essence of KRS beneficiaries' right is the receipt of promised pension benefits, not the oversight of the system.

But Plaintiffs also argue that we should adopt Section 107(2)(b) of the Restatement (Third) of Trusts, which allows a trust beneficiary to "maintain a proceeding against a third party on behalf of the trust and its beneficiaries only if . . . the trustee is unable, unavailable, unsuitable, or improperly failing to protect the beneficiary's interest." But that provision would not be applicable in this case, as beneficiaries of a defined-benefit pension plan, unlike beneficiaries of a private trust, possess no equitable interest in the plan assets, as the value of those assets has no impact on their right to be paid benefits.[80] Accordingly, we are constrained to reject this argument as well.[81]

Our decision today borrows heavily from the analysis of Thole[82] and other federal circuit cases discussing the *constitutional standing* of beneficiaries in defined-benefit plans governed by ERISA to sue for alleged fiduciary misconduct that results in losses to the plan's assets. **[*33]** ***HN10***[↑] We recognize that ERISA does not apply to government plans,[83] including KRS. And we express no intent to construe statutory provisions governing KRS as consistent with any part of ERISA. We express no opinion on KRS beneficiaries' claims, if any, under Ky. Const. § 19. By contrast, this case concerns only the ability of beneficiaries of KRS defined-benefit plans to sue for alleged shortfalls in the KRS plan assets because of alleged administrative misconduct.

iv. Standing as Taxpayers.

Plaintiffs alternatively assert that they have standing as taxpayers suing on behalf of the Commonwealth to recover misspent, misused or wasted tax dollars from those responsible. Specifically, Plaintiffs point to the allegedly wasted tax dollars that were paid into KRS based on false financial and actuarial information, roughly $1.5 to $1.8 billion spent on questionable investments for KRS, and future costs to the Commonwealth in otherwise avoidable taxpayer-funded payments to KRS to make up for the alleged misconduct. But this theory of standing fails too.

Plaintiffs appear to argue both that they have standing as taxpayers harmed by the misuse of taxpayer funds *and* as taxpayers bringing claims on behalf of the Commonwealth. **[*34]** [84] While Kentucky courts have historically permitted taxpayer claims in certain circumstances as a matter of equity,[85] we have never allowed a suit like this.

First, taxpayers in Kentucky, on behalf of themselves, have been permitted to sue government bodies or their agents to challenge the propriety of city, county, or state tax or expenditure of public funds. Indeed, Plaintiffs cite only to cases against government entities in which taxpayers seek to enjoin the imposition of an illegal tax or expenditure of public funds or to compel compliance with certain statutory or constitutional requirements attached thereto.[86] Only in two cases cited by Plaintiffs

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[80] *See* Thole, 140 S. Ct. at 1619 (explaining that plan participants in a defined-benefit retirement plan, unlike beneficiaries of a private trust, possess no equitable or property interest in the plan).

[81] In a recent case, Kentucky Emp. Ret. Sys. v. Seven Counties Services, 580 S.W.3d 530 (Ky. 2019), this Court acknowledged that KRS is a trust created by statute. Id. at 544. Our opinion today does not depart from that observation, but instead concludes that Plaintiffs, as beneficiaries of a defined-benefit plan, possess no equitable or property interest in the KRS plan assets and therefore have no standing under trust law to bring a mismanagement claim. *See* Thole, 140 S. Ct. at 1619-20.

[82] 140 S. Ct. at 1620.

[83] *See* 29 USC § 1003(b)(2) ("The provisions of this subchapter shall not apply to any employee benefit plan if . . . such plan is a governmental plan (as defined in ***section 1002(32)*** of this title)[.]").

[84] Plaintiffs' Amended Complaint and Appellant's Brief in the Writ Case both state that they are suing as taxpayers *on behalf of the Commonwealth*—thus invoking the derivative theory of taxpayer standing. But the arguments made in their brief and Amended Complaint enter the territory of traditional taxpayer claims brought by and on behalf of citizen taxpayers. ***HN11***[↑] *See* MUNICORP § 52:13, Citizens' and Taxpayers Suit, Standing in General (noting the two different types of taxpayer suits: "Taxpayers may have standing to sue either in their personal capacity as taxpayers or derivatively on behalf of a local governmental unit (taxpayer derivative)").

[85] Rosenbalm v. Commercial Bank, 838 S.W.2d 423, 427 (Ky. 1992) (citing 74 Am.Jur.2d Taxpayers' Actions § 2 (1974) at 185).

[86] *See* id at 423 (allowing six Bell County taxpayers to intervene, on behalf of themselves, in a suit to challenge the imposition of a county tax to pay the debts of the Bell County Garbage and Refuse Disposal District); Gay v. Haggard, 133 Ky. 425, 118 S.W. 299 (Ky. 1909) (taxpayer of Clark County bringing suit on his own behalf and the behalf of all other

do taxpayers seek any form of monetary relief; and in both cases, county taxpayers were permitted to sue local government officials to recover salaries illegally paid to them in excess of a county fiscal court order.[87]

By contrast, under this direct-taxpayer theory of standing, Plaintiffs seek damages from private third parties and KRS officials in their individual capacities for tort damages allegedly sustained to all Kentucky taxpayers. Plaintiffs do not cite, and we cannot find, any Kentucky cases permitting **[*35]** such a novel theory of standing. Plaintiff's reference this Court's statement in *Yeoman v. Comm. of Kentucky, Health Policy Bd.*[88]: "The misuse of the taxpayers' funds is one form of an alleged injury that can take place. Accordingly, any taxpayer of the Commonwealth is permitted to sue on this basis." But, for that proposition *Yeoman* cites to *Gillis v. Yount*[89] in which taxpayers challenged a statute taxing unmined coal as unconstitutional[90] *and Second Street Properties v. Fiscal Court of Jefferson Cnty, Ky*.[91] in which it was held that taxpayers of Jefferson County could not maintain an action challenging as unconstitutional statutes affecting taxes in certain counties but not others because the statute imposed no burden on taxpayers of Jefferson County.[92] And *Yeoman* did not itself deal with taxpayer standing because the plaintiffs' privacy interest in medical information, which was not related to the generation or expenditure of state funds, was sufficient.[93] As such, the *Yeoman* court was referring to the ability of taxpayers to challenge the constitutionality of statutes affecting taxes and public expenditures and therefore provides no support to Plaintiffs.

Second, Plaintiffs also purport **[*36]** to bring their claims on behalf of the Commonwealth as a matter of equity because they have made a demand to the Attorney General to assert their claims, but he declined. But Plaintiffs likewise provide no authority in support of their ability to bring claims in a derivative capacity on behalf of the Commonwealth.

HN12[↑] Under Kentucky law, the Attorney General, as a constitutionally elected official, is empowered to represent the Commonwealth in cases in which the Commonwealth is the real party in interest. *KRS 15.020*[94] provides that in the role of "chief law officer of the Commonwealth of Kentucky[.]" the Attorney General "shall exercise all common law duties and authorities pertaining to the office of the Attorney General under the common law, except when modified by statutory

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taxpayers of Clark County against the supervisor of Clark County roads to compel compliance with statutory competitive bidding requirements for work on public roads in the county). *Price v. Commonwealth, 945 S.W.2d 429, 43 9 Ky. L. Summary 8 (Ky. App. 1996)* (taxpayers bringing suit on behalf of themselves seeking injunctive and declaratory relief to bar payment of any funds under a legislative enactment against the Commonwealth of Kentucky, Transportation Cabinet and the Secretary of Transportation in his official capacity); *Elam v. Salisbury, 180 Ky. 142, 202 S.W. 56 (Ky. 1918)* (taxpayer of city of Ashland seeking writ of mandamus on behalf of himself and other taxpayers against the mayor and members of the city council to compel the proper tax assessment of certain properties); *Yeoman v. Comm. of Kentucky, Health Policy Board, 983 S.W.2d 459, 473, 45 13 Ky. L. Summary 36 (Ky. 1998)* (physician and patient had standing to challenge constitutionality of healthcare reform bill which allowed collection and use of certain medical data as violation of privacy rights, but not as taxpayers); and *Russman v. Luckett, 391 S.W.2d 694 (Ky. 1965)* (taxpayers bringing suit on behalf of themselves against Kentucky Department of Revenue and its Commissioner to challenge the constitutionality of Kentucky's tax assessment statutes and procedures).

[87] *See* *Williams v. Stallard, 185 Ky. 10, 213 S.W. 197 (Ky. 1919)* (taxpayers of county suing "on behalf of himself and all other taxpayers, for the use and benefit of the county" to recover money paid to the county judge of Pike County in excess of his salary as defined by a fiscal court order); *Fox v. Lantrip, 169 Ky. 759, 185 S.W. 136, 139 (Ky. 1916)* (taxpayer of Hopkins County brought suit on behalf of himself against county superintendent to recover money illegally appropriated and paid to the him by the fiscal court).

[88] *983 S.W.2d at 473*.

[89] *748 S.W.2d 357 (Ky. 1988)*

[90] *Id. at 357*.

[91] *445 S.W.2d 709, 716 (1969)*

[92] *Id.*

[93] *Yeoman, 983 S.W.2d at 473*.

[94] ***HN13***[↑] Under Ky. Const. § 91, the Attorney General is an elected constitutional officer whose "duties . . . shall be prescribed by law." And "[t]he General Assembly has prescribed the Attorney General's duties and responsibilities in *KRS § 15.020* . . . ." *Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin, 498 S.W.3d 355, 361 (Ky. 2016)*.

enactment."[95] "It is unquestioned that '[a]t common law, [the Attorney General] had 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.'"[96] This authority necessarily includes the "broad powers to initiate and defend actions on behalf of the people of the Commonwealth."[97]

HN14[↑] As a constitutionally elected officer, the Attorney General is entrusted with broad discretion in the performance of his duties, which includes evaluating the evidence and other facts to determine whether a particular claim should be brought.[98] And, importantly, when the Attorney General turns to outside counsel to assert claims belonging to the Commonwealth, their relationship is governed by strict statutory procurement and oversight requirements.[99]

But in this case, not only has the Attorney General presumably exercised his discretion in declining to bring the Plaintiffs' claims, but he is also wholly uninvolved with the litigation. Plaintiffs do not assert that the Attorney General has authorized this suit, assigned a portion of the claims' recovery to the parties involved, or even that he has tacitly approved of their litigation. Instead, Plaintiffs lawsuit proceeds entirely independent of the Office of the Attorney General, and no oversight requirements governing the litigation apply.

Given that taxpayer claims are governed to a large extent by equity principles,[100] and taking into consideration the stringent **[*38]** oversight requirements otherwise imposed on outside counsel hired by the Attorney General, we conclude Plaintiffs also lack standing under this theory.

III. CONCLUSION.

Ultimately, this Court recognizes that Plaintiffs allege significant misconduct, but, as a matter of law, these eight Plaintiffs, as beneficiaries of a defined-benefit plan who have received all of their vested benefits so far and are legally entitled to receive their benefits for the rest of their lives, do not have a concrete stake in this case. And without a concrete stake in the case, the Plaintiffs lack constitutional standing to bring their claims in our courts. We remand this case to the circuit court with direction to dismiss the complaint.

All sitting. All concur.

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[95] *See also* Commonwealth ex rel. Hancock v. Paxton, 516 S.W.2d 865, 867 (Ky.1974) (stating that the Attorney General "is possessed of all common law powers and duties of the office except as modified by the Constitution or statutes.").

[96] Commonwealth ex rel. Conway v. Thompson, 300 S.W.3d 152, 173 (Ky. 2009) (citing Paxton, 516 S.W.2d at 867).

[97] *Id. See also, id.* ("It is the Attorney General's responsibility to file suit to vindicate public rights, as attorney for the people of the State of Kentucky." (quoting Commonwealth ex rel. Cowan v. Wilkinson, 828 S.W.2d 610, 618, 39 3 Ky. L. Summary 12 (Ky. 1992), *overruled* **[*37]** *by* Thompson, 300 S.W.3d 152 (internal quotation marks omitted)). Other states have similarly concluded that their Attorneys General have the exclusive authority to sue on behalf of the state when the state is the only real party in interest. *See e.g.,* Lyons v. Ryan, 201 Ill. 2d 529, 780 N.E.2d 1098, 1103, 269 Ill. Dec. 374 (Ill. 2002) (recognizing "that the Attorney General is the sole officer authorized to represent the People of this State in any litigation in which the People of the State are the real party in interest" (citing People ex rel. Scott v. Briceland, 65 Ill. 2d 485, 359 N.E.2d 149, 3 Ill. Dec. 739 (1976)).

[98] *See* 7A C.J.S. *Attorney General* § 30 ("Ordinarily, the state attorney general exercises the functions incident to the office with discretion, including particularly large discretion in matters of public concern or compelling public interest, and prosecutorial discretion.") (citations omitted). *See also* Lyons v. Ryan, 201 Ill. 2d 529, 780 N.E.2d 1098, 1104-05, 269 Ill. Dec. 374 (Ill. 2002) ("The Attorney General, as an elected representative of the citizens of this state, is responsible for evaluating the evidence and other pertinent factors to determine what action, if any, can and should properly be taken and what penalties should be sought.") (citations omitted).

[99] *See* Landrum v. Commonwealth ex rel. Beshear, 599 S.W.3d 781, 2019 WL 4072505, at *4-6 (Ky. 2019) (holding that any possible recovery from lawsuit in which the Office of Attorney General had hired outside counsel to pursue tort claims against opioid manufacturers on behalf of Kentucky constituted "public funds" and the contract was therefore subject to contracting-oversight requirements of the Model Procurement Code).

[100] Rosenbalm, 838 S.W.2d at 427 (citing 74 Am.Jur.2d Taxpayers' Actions § 2 (1974) at 185).