Commonwealth of Kentucky

Court of Appeals

NO. 2024-CA-0781-OA

KKR & CO., L.P.; BLACKSTONE ALTERNATIVE ASSET MANAGEMENT; BLACKSTONE GROUP INC.; BLACKSTONE GROUP L.P.; GEORGE R. ROBERTS; GIRISH REDDY; HENRY R. KRAVIS; J. TOMILSON HILL; JANE BUCHAN; PACIFIC ALTERNATIVE ASSET MANAGEMENT CO.; PRISMA CAPITAL PARTNERS SM, L.P.; AND STEPHEN A. SCHWARZMAN — PETITIONERS

v. — AN ORIGINAL ACTION ARISING FROM FRANKLIN CIRCUIT COURT ACTION NO. 21-CI-00645

HON. THOMAS D. WINGATE JUDGE, FRANKLIN CIRCUIT COURT — RESPONDENT

AND

ASHLEY HALL-NAGY; BOBBY ESTES; JACOB WALSON; KENTUCKY RETIREMENT SYSTEMS, ITS PENSION AND INSURANCE TRUSTS FOR THE

BENEFIT OF THOSE TRUSTS; AND TIA TAYLOR | REAL PARTIES IN INTEREST

ORDER
DENYING PETITION FOR A WRIT OF PROHIBITION

* * * * * *

BEFORE: COMBS, LAMBERT, AND McNEILL, JUDGES.

Petitioners filed a Kentucky Rule of Appellate Procedure (RAP) 60 petition for a writ prohibiting Respondent from enforcing an order entered on July 3, 2024, in which the Franklin Circuit Court denied Petitioners' motion to dismiss. The Real Parties in Interest, Tia Taylor, Ashley Hall Nagy, Bobby Estes, and Jacob Watson, filed a response after this Court granted them an extension of time to do so. Having reviewed the petition, the response, and being otherwise sufficiently advised, the petition shall be, and hereby is, DENIED.

BACKGROUND

The Real Parties in Interest are participants in the Kentucky Retirement System (KRS) plan. Because they began participation in KRS after January 1, 2014, they are "Tier 3" participants in the plan. Unlike participants who began the plan before that date, they do not have a defined benefit plan under which retirees receive a fixed payment each month. The parties describe Tier 3 as a "hybrid plan," which generally has elements of both a defined benefit plan and what is known as a "defined contribution" plan. The Real Parties in Interest filed

suit against numerous individuals and entities, including Petitioners, in the trial court, alleging KRS had imprudently invested in hedge fund products over a period of years, both as a result of negligent and intentional conduct. Defendants below included hedge funds, hedge fund managers and employees, middlemen, and officers and trustees of KRS itself.

Petitioners in this original action are three principal hedge fund entities and related individuals and entities. Petitioners moved the trial court to dismiss claims against them, arguing, *inter alia*, that the Real Parties in Interest lacked constitutional standing as they had not alleged a concrete injury. Further, Petitioners argued the Real Parties in Interest lacked standing to recover damages on behalf of the Tier 3 pool of funds. Finally, Petitioners argued that the Real Parties in Interest sought relief which was duplicative of the relief sought by the Kentucky Attorney General's office in a separate case against them.[1]

On May 1, 2024, the trial court entered an omnibus order which addressed numerous motions to dismiss filed by various defendants. The trial court rejected Petitioners' arguments that the Real Parties in Interest lacked standing and that the Petitioners' claims were duplicative of the Attorney General's.

[1] Petitioners raised other arguments as well, but only seek relief based on these three issues in this original action.

This original action followed. Additional facts regarding the historical underpinnings of Petitioners' argument shall be discussed below as necessary to facilitate this Court's analysis.

ANALYSIS

A writ is an extraordinary remedy. It is now well settled:

> A writ of prohibition *may* be granted upon a showing that (1) the 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.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004).

Petitioners argue they are entitled to a writ of the first class because the Real Parties in Interest lack standing in the case below. The Kentucky Supreme Court has never recognized a lack of standing as giving rise to a writ of the first class. Petitioners, however, cite this Court's Order in *Prisma Capital Partners, LP v. Shepherd*, No. 2019-CA-0043-OA (Ky. Ct. App. April 25, 2019), as support for this proposition. *Prisma Capital Partners, LP* was also an original action in this Court arising from a case in Franklin Circuit Court in which "Tier 1" and "Tier 2" plaintiffs made similar allegations against Petitioners and others (the "Overstreet litigation"). Full consideration of the issues raised by Petitioners in

this case is not possible without the context of the issues decided by appellate courts in the Overstreet litigation.

The Kentucky Supreme Court described the procedural posture of the Overstreet litigation in *Overstreet v. Mayberry*, 603 S.W.3d 244, (Ky. 2020):

> 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, 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 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. We heard oral argument in all three cases on the same day, and now render this opinion and orders adjudicating those cases simultaneously.

Id. at 251. The *Overstreet* Court's reference to the writ of prohibition granted by this Court is a reference to the order entered in *Prisma Capital Partners, LP*, the case upon which Petitioners now rely. It is important to note the distinction between the direct appeals of trial court's orders and the appeal of this Court's

order in *Prisma Capital Partners, LP* which were before the Kentucky Supreme Court at that time. The "KRS trustee and officer defendants" brought direct appeals of the trial court's order as to the rulings on sovereign immunity and standing. The Kentucky Supreme Court's ability to review standing on a direct appeal was a result of the principles then recently annunciated in *Commonwealth Cabinet for Health & Family Servs., Dep't for Medicaid Servs. v. Sexton by & through Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185 (Ky. 2018), rehg denied (Feb. 14, 2019). Quoting *Sexton*, the Kentucky Supreme Court noted:

> 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. 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.

Overstreet v. Mayberry, 603 S.W.3d at 251 (quotations omitted). Ultimately, the Kentucky Supreme Court determined that the plaintiffs in *Overstreet* lacked constitutional standing, and by way of the two direct appeals reversed the trial court and remanded the case with directions to dismiss the action in its entirety. *Id.* at 266. The Court neither affirmed nor reversed this Court's ruling in the *Prisma Capital Partners, LP* writ action. It instead dismissed that matter as moot as it had already determined that the entire trial court action should be dismissed. *Id.* at n. 4,

6.

This Court's determination that a lack of constitutional standing was appropriate for a writ of the first class was based on the teachings of the then-recent *Sexton* case. However, in the intervening time period, the Kentucky Supreme Court has yet to speak directly to this issue, and the conclusion we reached in *Prisma Capital Partners, LP* admittedly represented a departure in the law concerning writs of the first class. Additional analysis is warranted.

Jurisdiction and standing are without question distinct concepts. "The key difference is that subject-matter jurisdiction involves a court's ability to hear a type of case while standing involves a party's ability to bring a specific case." *Harrison v. Leach*, 323 S.W.3d 702, 705 (Ky. 2010). "The court has subject matter jurisdiction when the 'kind of case' identified in the pleadings is one which the court has been empowered, by statute or constitutional provision, to adjudicate." *Daugherty v. Telek*, 366 S.W.3d 463, 467 (Ky. 2012) (citation omitted). Traditionally, a writ of the first class has not been available to challenge "particular case jurisdiction." Petitioners do not argue the trial court lacks the authority to hear this kind of case.

This is an important distinction in this action. Because Petitioners plainly do not meet the prerequisites for issuance of a writ of the second class,[2]

[2] This is true for reasons discussed below.

whether this Court may consider standing at this juncture hinges entirely on whether a writ of the first class is available.

Since *Sexton* and *Prisma Partners, LP* were decided, the Kentucky Supreme Court spoke to standing in terms of a writ of the first class in *Goff v. Edwards*, 653 S.W.3d 847 (Ky. 2022). There, the Supreme Court affirmed this Court's decision to deny a petition for a writ of prohibition in which the petitioner argued both that the trial court lacked subject matter jurisdiction and, separately, that the plaintiffs in the underlying case lacked standing. *Id.* The Court analyzed the subject matter jurisdiction argument under the first-class writ standard, and the standing argument under the second-class writ standard. *Id.* at 855-56. The Court further quoted *Harrison* for the proposition that "[a]lthough the concepts bear some resemblance to each other, standing is distinct from subject-matter jurisdiction." *Id.* at 844 (quoting *Harrison*, 323 S.W.3d at 706.)

However, a close reading of *Goff* reveals that the Court's decision was based on its assessment that the standing issue raised by appellants implicated statutory, not constitutional, standing:

> While Goff argues that constitutional standing is implicated, we must disagree. . . .
>
> As Goff has framed her argument, she essentially asserts that her Sisters do not have what courts have referred to as "statutory standing." Standing in this sense has to do with "whether a statute creating a private right of action authorizes a particular plaintiff to avail herself of that

> right of action." *Small v. Federal National Mortgage Association*, 286 Va. 119, 747 S.E.2d 817 (2013) (quoting *CGM, LLC v. BellSouth Telecomm., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011)). The question is whether the plaintiff is among the class of persons authorized by the statute to bring suit, and as such "statutory standing" is not a jurisdictional question, but is essentially a matter of statutory construction . . . .
>
> With it being established that the circuit court has subject-matter jurisdiction of this case, the Court of Appeals did not err by addressing whether a second-class writ may issue on Goff's behalf.

Goff, 653 S.W.3d at 854. Thus, the Court suggested, without reaching the issue, that had Goff made a true constitutional standing argument, it would have applied the first-class writ standard; *i.e.*, granting a writ if the plaintiff below indeed lacked constitutional standing.

This reading is consistent with *Sexton*, which places the question of constitutional standing on separate footing than other standing doctrines. "[A]ll Kentucky courts have the constitutional duty to ascertain the issue of constitutional standing, acting on their own motion, to ensure that only *justiciable causes* proceed in court, because the issue of constitutional standing is not waivable." *Sexton*, 566 S.W.3d at 192 (emphasis original). Despite this conclusion, however, the Court still cautioned that standing itself was not a proper subject of an interlocutory appeal. *Id.* at 191.

Finally, we note that the Kentucky Supreme Court has previously

ruled, despite the typical "particular case" versus "this kind of case" dichotomy, that a lack of justiciability implicates subject matter jurisdiction. "Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it." *Nordike v. Nordike*, 231 S.W.3d 733, 739 (Ky. 2007) (quoting *Doe v. Golden and Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005)). While the holdings in *Nordike* and *Doe* both concern claims which were not yet ripe, the cases nonetheless stand for the proposition that justiciability and subject matter jurisdiction are inextricable concepts.

Accordingly, as we did in *Prisma Capital Partners, LP*, we analyze Petitioners' claim that the Real Parties in Interest lacked constitutional standing under the first-class writ standard. As standing is a legal issue, we review the trial court's decision *de novo*. *Cameron v. EMW Women's Surgical Center, P.S.C.*, 664 S.W.3d 633, 647 (Ky. 2023).

As an initial matter, we note that Tier 3 KRS participants are not similarly situated to those in Tiers 1 and 2. The Court recognized this distinction in *Overstreet*:

> 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. 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. So, any alleged mismanagement of the KRS plan has no direct bearing on whether the KRS-member Plaintiffs in this case will receive their vested monthly retirement payments.

Id. at 253. The Court specifically noted at this point in its analysis that none of the plaintiffs below were Tier 3 participants. *Id.* at n. 21.

The Court next dispensed with the plaintiffs' contention that they suffered an increased risk of their benefits not being paid due to mismanagement. "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." *Id.* at 253. Yet, the "inviolable contract" referred to by the Court in *Overstreet* specifically excludes the Tier 3 plaintiffs who have brought the action in the case *sub judice*.

KRS 61.692(1), 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:

> (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.

(Emphasis added). Thus, the codification of the "inviolable contract" specifically excludes Tier 3 participants. As such, the facts underlying the principles the Kentucky Supreme Court relied upon to determine the plaintiffs lacked constitutional standing in *Overstreet* are not present in this case. Petitioners argue the distinctions are not material and that the Real Parties in Interest still lack constitutional standing. We disagree.

The *Sexton* Court adopted the test for constitutional standing set forth by the United States Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992), "as a predicate for bringing suit in Kentucky's courts." *Sexton*, 566 S.W.3d at 196. In particular: "To invoke the court's jurisdiction, the plaintiff must allege [1] an *injury* [2] *caused* by the defendant [3] of a sort the court is able to *redress*." *Id.* (citing *Lujan*, 504 U.S. at 560-61 (emphasis original)). An "injury" under the *Lujan* test must be:

> (a) concrete and particularized, and
>
> (b) actual or imminent, not conjectural or hypothetical

Lujan, 504 U.S. at 560 (internal citations omitted). *See Sexton*, 566 S.W.3d at 196 (citations omitted).

Petitioners argue that the alleged damages of the Real Parties in Interest are still too speculative to survive constitutional standing analysis. The parties agree that Tier 3 participants are entitled to a statutory floor of 4% interest each year with the possibility of "upside sharing" increasing this percentage if their invested funds perform well. Petitioners argue that because the latter is not guaranteed from year to year, that Tier 3 is still a defined-benefit plan for the purposes of constitutional standing analysis. This is not reflective of reality. While the value of a Tier 1 or 2 participant's retirement benefits bears no relationship to the performance of investments, the value of a Tier 3 participant's plan plainly does.[3]

At this time, the Court is only concerned with whether the Real Parties in Interest have plausibly pled that they have suffered a "concrete and particularized" injury which is "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. We conclude they have. Whether they ultimately prove these damages or if Petitioners can show that no actionable conduct led to actual damages is a question for a different time.

The fact that damages are uncertain or difficult to calculate does not render them "too speculative." The Court's discussion of speculative injury in

[3] The performance of the investments will necessarily impact Tier 3 benefits unless the criteria for "upside sharing" on an annual basis are literally never met. Petitioners do not argue that is the case.

Overstreet centered on plaintiffs' claims 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." 603 S.W.3d at 253. Analogizing to caselaw concerning defined-benefit ERISA plans, the Court held that the potential insolvency of the KRS fund was purely speculative and hypothetical, and therefore not an "injury" under constitutional standing analysis. *Id.* at 254-55. Petitioners' argument that Tier 3 participants were never guaranteed "upside sharing" and therefore their damages are speculative is not remotely analogous.

Accordingly, we hold that the Real Parties in Interest have pled allegations sufficient to support constitutional standing and decline to issue a writ of the first class.

Consistent with *Goff*, we analyze Petitioners' arguments outside of constitutional standing under the second-class writ standard. This merits little discussion as Petitioners plainly do not meet the prerequisites for the issuance of a writ of the second class.

Writs "are truly extraordinary in nature and are reserved exclusively for those situations where litigants will be subjected to substantial injustice if they are required to proceed." *Indep. Order of Foresters v. Chauvin*, 175 S.W.3d 610, 615 (Ky. 2005). A writ of the second class requires a showing 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." *Hoskins,* 150 S.W.3d at 10. This second class also usually requires a showing that "great injustice and irreparable injury will result if the petition is not granted." *Id.*

While there are exceptions to the "great injustice and irreparable injury" requirement in "certain special cases,"[4] Petitioners do not argue that the certain special cases exception applies. Rather, they appear to argue that the burden of complex litigation in the event the case is not dismissed would result in irreparable harm. The Kentucky Supreme Court has consistently held that the mere burden of litigation does not support a showing of irreparable injury. Arguments concerning the time-consuming nature of litigation are routinely rejected in writ cases. *See, e.g., Fritch v. Caudill,* 146 S.W.3d 926, 930 (Ky. 2004) ("Inconvenience, expense, annoyance, and other undesirable aspects of litigation may be present, but great and irreparable injury is not."). A great and irreparable injury under our precedent is not merely the high cost of time and money attendant with litigation but, instead, is 'something of a ruinous nature[.]'" *Romines v. Coleman,* 671 S.W.3d 269, 276 (Ky. 2023) (quoting *Bender,* 343 S.W.2d at 801). If this argument were valid, the prerequisites for issuing a writ of the second class would be illusory, and an original action would merely serve as an interlocutory

[4] *Bender v. Eaton,* 343 S.W.2d 799, 801 (Ky. 1961).

appeal as opposed to a means to obtain extraordinary relief.

The showing that the petitioner lacks an "adequate remedy by appeal is an absolute prerequisite to the issuance of a writ under this second category." *Indep. Order of Foresters*, 175 S.W.3d at 615. Petitioners present no legitimate argument that they lack an adequate remedy by appeal. *Goff* is directly on point in this regard. There, the Kentucky Supreme Court affirmed this Court's ruling that a party challenging statutory standing has an adequate remedy by appeal upon entry of a final and appealable order. 653 S.W.3d at 855.

Petitioners cite inapplicable writ jurisprudence concerning erroneous discovery rulings to suggest that they lack an adequate remedy by appeal merely because they now must participate in discovery. This original action does not arise from a discovery dispute. A writ is not available to prevent purely speculative future harm. "[R]aw speculation is woefully insufficient to show ruinous injury" in the context of a writ petition. *Gilbert v. McDonald-Burkman*, 320 S.W.3d 79, 86 (Ky. 2010).

Similarly, Petitioners' argument that a recovery by the Real Parties in Interest may be duplicative of a potential recovery by the Kentucky Attorney General in a separate pending case is not sufficient to support a writ of the second class. If that occurs, Petitioners will have an adequate remedy by appeal.[5] In

[5] This concern should be ameliorated as Respondent acknowledged this issue in the May 1, 2024,

short, Petitioners seek an interpretation of the second-class writ standard that would render every denial of a motion to dismiss immediately reviewable. That is not the function of a writ petition.

CONCLUSION

WHEREFORE, the petition for a writ of prohibition shall be, and hereby is, DENIED.

ENTERED: November 12, 2024

JUDGE, COURT OF APPEALS

order and is presiding over both cases.