[Cite as *Bone v. K.A. Brown Oil & Gas, L.L.C.*, 2023-Ohio-2944.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

CHELSEA M. BONE ET AL,

Plaintiffs-Appellees,

v.

K. A. BROWN OIL & GAS LLC,

Defendant-Appellant,

MARY MERTZ, DIRECTOR OF
OHIO DEPARTMENT OF NATURAL RESOURCES,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 22 MO 0010

Civil Appeal from the
Court of Common Pleas of Monroe County, Ohio
Case No. 2022-048

BEFORE:
Mark A. Hanni, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Dismissed and Remanded.

Atty. Chelsea M. Bone, Chelsea M. Bone, LLC, 34735 State Route 7, Sardis, Ohio 43946, and *Atty. Flite H. Freimann*, Freimann Law, LLC, 318 Muskingum Drive, Marietta, Ohio 45750, for Plaintiffs-Appellees and

Atty. Gregory D. Russell, *Atty. Thomas H. Fusonie* and *Atty. Emily J. Taft*, Vorys, Sater, Seymour & Pease LLP, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008, for Defendant-Appellant and

Atty. Brett A. Kravitz, *Atty. Daniel Martin* and *Atty. Joseph Wambaugh*, Assistant Attorneys General, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215, for Defendant-Appellee.

Dated: August 22, 2023

HANNI, J.

{¶1} Defendant-Appellant K.A. Brown Oil & Gas, LLC (Appellant Brown) appeals the August 23, 2022 judgment of the Monroe County Court of Common Pleas granting a motion for preliminary injunction filed by Plaintiffs-Appellees Chelsea M. Bone (Attorney Bone), Franklin and Tamara Ellis (the Ellises), and David and Robin Hendershot (the Hendershots) (collectively Appellees). The court granted the preliminary injunction and ordered Appellant Brown to cease all preparation and drilling operations for a Class II injection well at the property site located on State Route 7.

{¶2} For the following reasons, we dismiss this appeal as premature and remand the case for the trial court to address threshold issues raised by the parties concerning mandamus, standing, mootness, and whether a final appealable order exists.

{¶3} On February 8, 2022, Appellees filed a complaint against Appellant Brown and Mary Mertz as Director of the Ohio Department of Natural Resources (ODNR). Appellees stated that they were residents of Monroe County who lived within 1,000 feet of a proposed injection well owned by Appellant Brown. They averred that Appellant Brown filed an application for a permit for a Class II Salt Water Injection Well and the ODNR issued a permit for the injection well on October 12, 2021. Appellees requested a writ of mandamus in Count One, a preliminary injunction in Count Two, and monetary damages in Count Three.

{¶4} Appellees alleged that OAC 1501:9-3-06(H)(1) required Appellant Brown to publish notice of its injection well permit application in a newspaper of general circulation in the county in which the proposed well is situated. Appellees submitted that Appellants

decided that the *Marietta Times* was the proper paper to publish notice for the proposed well, even though it is published in Parkersburg, West Virginia.

{¶5} Appellees averred that ODNR failed in its statutory duty to require Appellant Brown to publish proper notice under OAC 1501:9-3-06 by allowing notice to be filed in the *Marietta Times*. Appellees requested that the court order Appellant Brown to resubmit notice in the *Monroe County Beacon* and require ODNR to hold a public hearing on the proposed well. Appellees also requested that the court enjoin further action on the injection well until public notice was properly issued, a public hearing was held, and Appellant Brown met OAC 1501:9-3-04.

{¶6} On March 10, 2022, Defendant Mary Mertz filed a motion to dismiss the complaint as Director of ODNR. She asserted that she was not a proper party because she lacked authority to issue permits. She also contended that Appellees lacked standing to sue because they had notice of the drilling and were able to comment and objected to the well. Defendant Mertz also asserted that the OAC did not allow for challenges or objections to drilling permits because those decisions were solely in the discretion of the ODNR Chief.

{¶7} On March 15, 2022, Appellant Brown filed a motion to dismiss the complaint. Appellant Brown asserted that Appellees lacked standing to challenge an injection well permit that was already issued, they failed to meet the elements to compel mandamus, mandamus was not the appropriate remedy, and their claims failed on the merits.

{¶8} On June 6, 2022, Appellees filed a motion for preliminary injunction in the trial court. They requested that the court enjoin Appellant Brown from beginning drill operations at the well site. Appellant Brown opposed the motion.

{¶9} On June 29, 2022, the trial court issued a journal entry denying both motions to dismiss the complaint.

{¶10} On July 18, 2022, the trial court held a hearing on the motion for preliminary injunction, with parties and counsel present. On August 23, 2022, the trial court issued findings of fact, conclusions of law, and a judgment entry granting Appellees' motion. The court noted that the undisputed facts were that Appellant Brown filed for a

Class II injection well permit for a parcel of property located on State Route 7 and Appellees were landowners with properties near the proposed injection well site.

{¶11} The court found that Appellant Brown filed public notice for the proposed injection well in the *Marietta Times* and the ODNR approved the permit application. The court cited to *Proctor & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267-268 (2000), for the factors that courts consider in granting a preliminary injunction. The court also cited OAC 1501:9-3-06(H) for notice requirements and indicated that Appellees challenged whether Appellant Brown provided notice of the proposed well in a newspaper in the county where the proposed well was situated.

{¶12} The court concluded that while the *Marietta Times* circulated in Monroe County through the mail and electronically, it did not meet the OAC notice requirement. The court explained that the instant notice would eviscerate the OAC requirement because any newspaper available in Monroe County would suffice and citizens would have to scour all newspapers available in the county in order to find legal notices.

{¶13} The trial court also rejected Appellant's assertion that publishing in the *Marietta Times* satisfied OAC 1501:9-3-06(H)(1)'s third requirement of publishing notice for five consecutive days in a newspaper. Appellant explained that the *Monroe County Beacon* was published weekly, while the *Marietta Times* was published on a daily basis. The court held that nothing in the code section required publication for five consecutive calendar days and five consecutive days of publication satisfied the section and provided the same opportunity for notice.

{¶14} The court further found that Appellees would suffer irreparable harm and they had established that they were likely to succeed on the merits of their claims. The court referred to Appellant Brown's interference with Appellees' quiet enjoyment of their property due to numerous trucks and equipment noise for drilling the well. The court stressed that the most critical harm was illegal preparation and operation of the well.

{¶15} The court also considered the harm to Appellant due to the amount of money spent to prepare the site for the injection well. The court held that allowing Appellant Brown to continue operations when it appeared that Appellees would succeed on the merits would be condoning waste, which it would not do. The court found that third-party vendors and subcontractors already operating on the site would suffer some

harm, but they would be ordered to cease operations anyway if the court granted the injunction. The court found that Appellant Brown could make all third-parties whole since it was the sole owner of the site and responsible for all activities on the site.

{¶16} The court also agreed that the public interest was best served by granting the injunction because the OAC required proper public notice to inform citizens so that they could have their voices heard during the permit process. The court held that "[a]llowing notice in newspapers not located within the County and allowing operations to continue once that deficiency has been brought to the attention of the operator and Defendant ODNR undermines public confidence."

{¶17} Finding that the injunction would restore some faith in the rule of law and the permit process, the court granted a preliminary injunction and ordered Appellant Brown to cease operations at the well site.

{¶18} Appellant Brown appealed and raised the following three assignments of error:

> **The trial court erred in determining that it had jurisdiction to proceed to issue the requested preliminary injunction.**
>
> **The trial court erred by issuing the preliminary injunction.**
>
> **The trial court abused its discretion by granting Appellees' preliminary injunction without requiring Appellees to post any bond despite uncontroverted evidence of K.A. Brown's significant investment.**

{¶19} Appellees filed a brief and ODNR filed an Appellee-Defendant brief.

{¶20} We dismiss Appellant Brown's appeal as prematurely filed and remand this case to the trial court. A multitude of procedural problems remain unresolved in this case at the trial court level, which prevent us from making any determination. The first two threshold issues that the trial court must address before addressing the preliminary injunction are whether Appellees' complaint is properly a complaint in mandamus, and whether Appellees have standing to bring this case. If the trial court affirmatively answers these two questions, then it must proceed further and address whether a

preliminary injunction is appropriate and whether any ruling thereon is a final appealable order.

Mandamus

{¶21} We note that Appellees' complaint is captioned as Chelsea Bone, Franklin and Tamara Ellis, and David and Robin Hendershot as Plaintiffs versus K.A. Brown Oil & Gas LLC and Mary Mertz, Director of the Ohio Department of Natural Resources as Defendants. However, the complaint itself is not captioned as one in mandamus as required under R.C. 2731.04.

{¶22} The complaint states that the court has subject matter jurisdiction under 2731.02, regarding writs of mandamus. It states "Writ of Mandamus" as its first count and states the following in relevant part:

> 53. The Monroe County Beacon is the paper of general circulation for Monroe County.
>
> 54. ODNR failed in its statutory duty to require the public notice to be published in the paper of general circulation in the county in which the proposed injection well is to be located.
>
> 55. By allowing the notice to be published in The Marietta Times, a paper published in Parkersburg, West Virginia, ODNR circumvented the law and failed in its statutory duties.
>
> 56. Plaintiffs seek a writ of mandamus requiring Defendants to resubmit legal notice by publication in The Monroe County Beacon and requiring Defendant Mary Mertz to hold a public hearing on the proposed Injection Well.
>
> 57. Only publication notice in the Monroe County Beacon will give Plaintiffs (and other residents of Monroe County) the right to adequately respond to Brown's Injection Well within the time frame required by law.
>
> 58. Only public hearing will give Plaintiffs (and other residents of Monroe County) the right to adequately express their concerns to ODNR and give

> ODNR the opportunity to fully and fairly consider the dangers of the Injection Well's location prior to issuing an injection well permit.

{¶23} Appellees' prayer for relief also requests the following:

> 73. A writ of mandamus requiring Defendant Mary Mertz to require notice for the Guy Brown #1 Injection Well to be published in the Monroe County Beacon.
>
> 74. A writ of mandamus requiring Defendant Mary Mertz to reopen the comment period and to hold a public hearing on the Guy Brown #1 Injection Well.
>
> 75. An injunction preventing Defendant KA Brown Oil & Gas LLC from taking any further action on the proposed injection well.

{¶24} In *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382, ¶ 36, the Ohio Supreme Court dismissed an action in mandamus due to the relator's failure to comply with R.C. 2731.04. R.C. 2731.04 provides in relevant part that, "[a]pplication for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit."

{¶25} The Supreme Court noted that it had dismissed mandamus petitions when the relator failed to bring the action in the name of the state on the relation of the person requesting the writ. *Id*. at ¶ 34 (citations omitted). The Court held that when a party raises the relator's failure to comply with R.C. 2731.04 and the relator files a motion for leave to amend the caption of the complaint to correct the mandamus, the Court had granted leave to amend. *Id*. The Court went on to hold that:

> If, however, a respondent in a mandamus action raises this R.C. 2731.04 defect and relators fail to seek leave to amend their complaint to comply with R.C. 2731.04, the mandamus action must be dismissed. *Litigaide, Inc. v. Lakewood Police Dept. Custodian of Records* (1996), 75 Ohio St.3d 508, 664 N.E.2d 521.

Id. at ¶ 36.

{¶26} In the instant case, Appellees' complaint is not brought by petition or in the name of the State as required by R.C. 2731.04. ODNR raised this issue in its motion to dismiss Appellees' complaint under Civ. R. 12(B)(6). (Mar. 10, 2022 Mot. to Dismiss at 18). Appellees did not move for leave to amend their complaint in order to comply with R.C. 2731.04.

{¶27} Further, the trial court did not address this issue in ruling on the motion to dismiss. We hold that the court must address this issue to determine whether Appellees' complaint is properly brought as one in mandamus under R.C. 2731.04. Moreover, a mandamus action will not lie against a private party. *See State ex rel. McBroom v. Ricart Properties, Inc*., 10th Dist. Franklin No. 20AP-525, 2022-Ohio 1094, ¶ 19 (citing cases). A writ of mandamus issues to compel a public official to perform a public duty. *State ex rel. Martinelli v. Corrigan*, 68 Ohio St.3d 362, 363 (1994). Appellant Brown is included in the mandamus action portion of Appellees' complaint. Thus, the trial court should also address whether Appellant Brown is an appropriate party subject to a writ of mandamus, if the court determines that mandamus is appropriate in this case.

{¶28} Further, it is noted that Count Two of Appellees' complaint is a request for an injunction and Count Three is a request for monetary damages. Injunctive relief is not a cause of action, but is a remedy. *Woods v. Sharkin*, 8th Dist. Cuyahoga No. 110567, 2022-Ohio-1949, ¶ 70. The same applies to a request for monetary damages.

{¶29} In addition, the trial court did not address whether Appellees have standing to file a mandamus action and a motion for preliminary injunction. The trial court ruled solely on the motion for preliminary injunction and mentioned nothing about standing or mandamus, despite requests that it do so in the motions to dismiss the complaint under Civ. R. 12(B)(6) and in the oppositions to the motion for preliminary injunction. To establish traditional standing, a party must show that the party has "suffered (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief." *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The trial court must address the issue of standing as to Appellees in this case.

{¶30} If the trial court addresses the issues of mandamus and standing and finds in favor of Appellees, only then may the court proceed with determining a motion for preliminary injunction. Should the court determine to grant the motion for preliminary injunction, it must then be determined whether the order is a final appealable order in order to be reviewed by this Court.

{¶31} For these reasons, Appellant Brown's appeal is dismissed as premature and this matter is remanded to the trial court to proceed in accordance with this Opinion.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant Brown's appeal is dismissed as premature and this matter is remanded to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.