

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002406-MR

EXECUTIVE BRANCH ETHICS COMMISSION

APPELLANT

ON REMAND FROM KENTUCKY SUPREME COURT  
ACTION NO. 99-SC-000690

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER CRITTENDEN, JUDGE  
ACTION NO. 97-CI-00038

DON STEPHENS

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\* \* \* \* \* \*

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. The Executive Branch Ethics Commission ("the Ethics Commission") appeals from an order of the Franklin Circuit Court granting summary judgment in favor of Don Stephens ("Stephens"). The Circuit Court found in relevant part that the Ethics Commission lacked jurisdiction to maintain an administrative ethics complaint against Stephens and that Stephens was immune from the complaint. We affirm.

Stephens served as Kentucky Commissioner of Insurance from November, 1992, until December, 1995. Pursuant to Kentucky

Revised Statute (KRS) 304.33.200(1), Stephens concurrently served as liquidator of the estate of Kentucky Central Life Insurance Company ("KCL"). After resigning as Commissioner (and thus liquidator of KCL), interim Commissioner Suetta Dickinson proposed that Stephens serve as deputy liquidator of KCL and a contract was entered into to that effect. Upon reviewing the contract, the Franklin Circuit Court approved the appointment.<sup>1</sup>

Subsequent to this appointment, the Ethics Commission instituted an administrative action against Stephens alleging that Stephens had violated KRS 11A.020(1) by a) improperly using his influence as a public servant to obtain the private position of deputy liquidator; b) improperly using his position as Commissioner to influence the hiring of himself as deputy liquidator; c) improperly using his position as Commissioner to obtain financial gain for himself by having himself appointed as deputy liquidator; and, d) improperly using his position as Commissioner to secure privileges, advantages, and treatment for himself by requesting that interim Commissioner Suetta Dickinson appoint him as deputy liquidator and by agreeing to a contract for services which was more extensive than provided for by statute in that the appointment as deputy liquidator would terminate only upon the termination of the liquidation

---

<sup>1</sup>Stephens alleged in his complaint that Joe Hudson, counsel for the estate of KCL, drafted a proposed contract prior to Stephens' resignation as commissioner of insurance, and that Stephens had no discussions with interim commissioner Suetta Dickinson regarding the proposed appointment. The Ethics Commission has maintained that Stephens and Dickinson acted in concert to bring about the appointment.

proceedings, in the event of Stephen's death or total disability, or for cause.<sup>2</sup>

The matter proceeded at the administrative level, where Stephens filed a motion to dismiss the charges on several grounds including lack of jurisdiction. Stephens also argued that the Kentucky Insurance Code left him immune from said charges. On December 10, 1996, a hearing officer denied Stephens' motion.

On January 14, 1997, and during the pendency of the administrative process, Stephens filed the instant action in Franklin Circuit Court seeking declaratory and injunctive relief. He sought to have the administrative complaint dismissed with prejudice on the grounds that the Ethics Commission acted outside the scope of its jurisdiction. Stephens also sought a declaratory judgment holding that his conduct in accepting the appointment as deputy liquidator did not run afoul of KRS Chapter 11A; that KCL was not a "person that contracts or does business with the state" within the meaning of KRS 11A.040; and, that he was entitled to immunity under KRS 304.33-115.

On January 31, 1997, the Ethics Commission filed a motion to dismiss Stephens' action. Two weeks later, Stephens filed a motion seeking summary judgment.

On May 6, 1997, the Franklin Circuit Court overruled the Ethics Commission's motion to dismiss and granted Stephens' motion seeking summary judgment. In so doing, the court opined in relevant part that the Ethics Commission was without

---

<sup>2</sup>Though not addressed by the parties, it appears that the remedy sought by the Ethics Commission would include Stephens' removal from his position as deputy liquidator.

jurisdiction to bring charges against Stephens because KRS 304.33-040 vests exclusive jurisdiction in the Franklin Circuit Court to hear and adjudicate all matters related to insurer liquidation. It further found that Stephens acted with immunity, and that KCL was not a entity doing business with the state as defined by KRS Chapter 11A. This appeal followed.

On June 25, 1999, a panel of this Court dismissed the Ethics Commission's appeal as untimely. The Kentucky Supreme Court then granted discretionary review, and thereafter vacated the order dismissing the appeal in light of CR 73.02(2) and Ready v. Jamison, Ky., 705 S.W.2d 479 (1986). We will now address the Ethics Commission's appeal as originally briefed.

The Ethics Commission now offers several claims of error. It maintains that KRS Chapter 13B requires that there be a final administrative resolution of the charges before proceeding to Franklin Circuit Court. It also argues that the circuit court had no jurisdiction to rule on Stephens' motion for summary judgment, and in the alternative that summary judgment was premature because of the existence genuine issues of material fact.

In response, Stephens maintains that the circuit court had jurisdiction to decide the legal issues presented in this case; that when an administrative agency acts without subject matter jurisdiction, the courts have authority to act without the exhaustion of administrative remedies; that the code of ethics does not prohibit a former public servant from serving as an officer of the court in a judicial proceeding; and, that he is

entitled to both statutory and common law immunity from the charges brought by the Ethics Commission.

We have closely studied the record, the law, and the arguments of counsel, and cannot conclude that the Franklin Circuit Court committed reversible error in entering summary judgment in favor of Stephens. On the question of whether Stephens was required to exhaust the administrative process before proceeding in circuit court, we believe that the circuit court properly found that a claim of improper jurisdiction is justiciable during the pendency of the administrative process. See generally, Goodwin v. City of Louisville, Ky., 215 S.W.2d 557 (1948) (stating at p.559 that " . . . direct judicial relief is held available without exhaustion of administrative remedies where . . . the complaint raises an issue of jurisdiction as a mere legal question . . . ."). This concept is related to the general principle that jurisdictional issues may be raised at any time, even de novo on appeal. Commonwealth Health Corporation v. Croslin, Ky., 920 S.W.2d 46 (1996); Duncan v. O'Nan, Ky., 451 S.W.2d 626 (1970). Since a finding of proper jurisdiction is a prerequisite to any judicial or quasi-judicial (i.e., administrative) action, we believe that it was proper for the Franklin Circuit Court to hear the issue prior to the resolution of the charges against Stephens before the Ethics Commission.

Having determined that it was proper for the circuit court to address the issue of jurisdiction, the next question is whether the court reached the proper result. We believe it did. As both the circuit court and Stephens have noted, the

legislature has vested the Franklin Circuit Court with exclusive jurisdiction in delinquency proceedings. KRS 304.33-040(3)(a) provides:

The court shall have exclusive jurisdiction to entertain, hear, or determine all matters in any way relating to any delinquency proceeding under this subtitle, including, but not limited to, all disputes involving purported assets of the insurer. (Emphasis added).

Similarly, KRS 304.33-190(2) provides:

Upon the issuance of an order directing the commissioner to liquidate a domestic insurer, the court shall have exclusive jurisdiction over all matters relating to the liquidation, including, but not limited to, the proper scope and application of the provisions of this subtitle to the liquidation as well as all interpretation and enforceability of all contracts of insurance to which the insurer is a party. (Emphasis added).

See also, Kentucky Central Life Insurance Company v. Stephens, Ky., 897 S.W.2d 583 (1995), holding in relevant part that the circuit court is afforded broad discretion as to supervision of proceedings under Insurers Rehabilitation and Liquidation Law.

It is worth noting that Stephens' appointment as deputy liquidator was itself an action of the Franklin Circuit Court, and Stephens' service in that capacity was service to the court rather than service to the estate of KCL. Stephens makes a compelling argument in this regard in noting that a receiver/liquidator serves at the pleasure of the court and on behalf of the court. Rosenbalm v. Commercial Bank, Ky. App., 838 S.W.2d 423 (1992); Moren v. Ohio Valley First Marine Insurance Company's Receiver, Ky., 6 S.W.2d 1091 (1928). In seeking to

remove Stephens as deputy liquidator, the Ethics Commission is, in effect, attempting to overrule the circuit court's appointment of Stephens. We believe this course of conduct runs afoul of both the statutory law and case law. In sum, we must conclude that the circuit court's exercise of jurisdiction was proper, and we find no error in its conclusion that the jurisdiction of the Franklin Circuit Court on this matter supersedes that of the Ethics Commission.

The Ethics Commission next argues that if the Franklin Circuit Court had jurisdiction to rule on the motion for summary judgment, the motion was improperly granted because there are unresolved genuine issues of material fact. In support of this argument, they maintain that Stephens was a public official subject to the requirements of KRS Chapter 11A, that KCL was an entity which did business with the Commonwealth, and that the immunity provisions of the Insurance Code apply only to acts or omissions done during the course of the delinquency proceedings.

We are not persuaded by this argument for at least two reasons. First, we regard the arguments presented by the Ethics Commission as questions of law rather than issues of fact. The interpretation of KRS Chapter 11A and the relevant provisions of the Insurance Code clearly are issues of law reserved for the trial court. More important, it is uncontroverted that the Ethics Commission did not respond to Stephen's motion for summary judgment, instead waiting to attack the judgment via a post-judgment motion to vacate, alter, or amend. When the movant establishes that there is no genuine issue of material fact and

that he entitled to a judgment as a matter of law, the burden shifts to the non-movant to produce evidence of an issue of fact that would warrant a trial. See generally, CR 56; Continental Casualty Company v. Belnap Hardware & Manufacturing Company, Ky., 281 S.W.2d 914 (1955). The burden shifted to The Ethics Commission, and it did not offer proof of a genuine issue of material fact. The record indicates that the Ethics Commission tendered the administrative record only after entry of the summary judgment. This offer of proof was found to be untimely, and accordingly the summary judgment was properly entered.

For the foregoing reasons, we affirm the summary judgment of the Franklin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donna G. Dutton  
Frankfort, KY

BRIEF FOR APPELLEE:

Phillip J. Shepherd  
Frankfort, KY