

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001975-MR

CAROL ERNST

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
ACTION NO. 99-CI-00052

SPRINTCOM, INC.;  
KENTUCKY PUBLIC SERVICE COMMISSION;  
DAVID CAYWOOD; AND LAURIE CAYWOOD

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUDGEL, CHIEF JUDGE, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Carol Ernst appeals from an order of the Franklin Circuit Court granting the motion of the Public Service Commission to dismiss the action for lack of jurisdiction. We opine that a summons was not timely issued for the Attorney General. Therefore, the jurisdiction of the Franklin Circuit Court was not invoked, and we affirm the dismissal.

On December 18, 1997, Sprintcom, Inc. filed an Application for a Certificate of Public Convenience and Necessity with the Kentucky Public Service Commission (hereinafter "PSC") to construct a wireless communications facility on the property

of David and Laurie Caywood in Campbell County, Kentucky. On November 6, 1998, the PSC entered an order approving the application. Carol Ernst, who owns property neighboring the Caywoods', petitioned the PSC for a rehearing on November 30, 1998. That petition was denied on December 21, 1998.

Pursuant to KRS 278.410,<sup>1</sup> Carol Ernst submitted a complaint to the Franklin Circuit Court on January 15, 1999, seeking reversal of the PSC's order. Summons was issued to all defendants in the circuit court action on January 15, 1999. As to the PSC, summons was served upon Helen Helton, Executive Director of the PSC. On February 4, 1999, the PSC moved to have the action dismissed, arguing that Carol Ernst had not served the Attorney General, as required by CR 4.04(6),<sup>2</sup> and thereby failed to bring the action within the thirty-day time limit mandated by KRS 278.410.<sup>3</sup>

On July 30, 1999, the Franklin Circuit Court dismissed the action, stating the court lacked subject matter jurisdiction over PSC because Carol had "failed to perfect her appeal within the time provided by statute." On appeal, Carol argues that service of summons upon the Attorney General is not required

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<sup>1</sup> KRS 278.410(1) states in pertinent part: "any party to a commission proceeding . . . may, within thirty (30) days after service of the order . . . bring an action against the commission in the Franklin Circuit Court to vacate or set aside the order or determination on the ground that it is unlawful or unreasonable."

<sup>2</sup> CR 4.04(6) states: "Service shall be made upon the Commonwealth or any agency thereof by serving the Attorney-General or any assistant attorney-general."

<sup>3</sup>On March 8, 1999, an amended summons was served upon the Attorney General.

because this action constitutes an appeal of an administrative agency. Carol relies on Cosmos Broadcasting Corp. v. Commonwealth, Transp. Cabinet, Aeronautical Div., Ky. App., 759 S.W.2d 824 (1988), to support the proposition that CR 4.04(6) does not apply to appeals from administrative orders. In Cosmos, the Court stated "we do not believe that CR 4.04(6) applies to appeals." Id. at 827. Carol's argument fails, however, because this action is not an appeal but an original action. "The circuit court may be authorized by law to review the actions or decisions of administrative agencies, special districts or boards. Such review shall not constitute an appeal but an original action." KRS 23A.010(4). See also Sarver v. County of Allen, Ky., 582 S.W.2d 40 (1979). Since the complaint is considered an original action, CR 4.04(6) does apply and service of summons upon the Attorney General is required.

Carol also argues that failure to serve the Attorney General does not defeat her action because she believed in "good faith" that service upon the Executive Director was sufficient. She relies on CR 3, which provides that "[a] civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith."

Although Carol filed her complaint within the statutory time, she failed to satisfy the second prong by which an action is commenced - issuance of a summons on the proper party. KRS 278.410(1) requires that "notice of the institution of such action shall be given to all parties of record before the commission." The PSC was a party of record in this action, and

service of process upon the PSC may only be through the Attorney General (or an assistant attorney general).

The good faith required by CR 3 is an "intention that [summons] be served presently or in due course" on the correct party. See Browning Manufacturing Division v. Paulus, Ky., 539 S.W.2d 296, 298 (1976). The appellant did not "in good faith" intend for the Attorney General to be served; rather, she "in good faith" thought that service upon the Executive Director of the PSC was sufficient. Unfortunately, this "good faith" mistake cannot eclipse the statutory mandate that the PSC be joined in a judicial review of its administrative findings only through service upon the Attorney General.

In failing to timely issue a summons on the Attorney General, Carol did not invoke the jurisdiction of the Franklin Circuit Court. Therefore, the judgment dismissing by the Franklin Circuit Court is affirmed.

GUDGEL, CHIEF JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING: I respectfully dissent. I believe that the statute at issue prevails over the civil rule and that the service of the summons on the executive director of the PSC was sufficient. I would reverse the circuit court. KRS 278.410(1) provides in part that "[a]ny party to a commission proceeding . . . affected by an order of the commission may, within thirty (30) days after service of the order . . . bring an action against the commission in the Franklin Circuit Court to vacate or set aside the order. . . . Notice of the institution of such action shall be given to all parties of record before the

commission." Carol complied with this statutory requirement by serving a summons on the Commission's executive director. I do not believe that the requirement in CR 4.04(6) that "[s]ervice shall be made upon the Commonwealth or any agency thereof by serving the Attorney-General or any assistant attorney general" supercedes that statutory provision. Cosmos, supra at 827.

BRIEF FOR APPELLANT:

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Steven G. Bolton  
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BRIEF FOR APPELLEE, KENTUCKY  
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