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NOVEMBER 13, 2002 (2002-SC-0333-D)

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000467-MR

ROCKWELL INTERNATIONAL CORPORATION

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 00-CI-00332

JIMMY D. HELTON, IN HIS OFFICIAL CAPACITY
AS SECRETARY, CABINET FOR HEALTH SERVICES,
COMMONWEALTH OF KENTUCKY; JAMES E. BICKFORD,
IN HIS OFFICIAL CAPACITY AS SECRETARY,
NATURAL RESOURCES AND ENVIRONMENTAL
PROTECTION CABINET, COMMONWEALTH OF KENTUCKY;
ANN R. LATTA, IN HER OFFICIAL CAPACITY AS
SECRETARY, TOURISM DEVELOPMENT CABINET,
COMMONWEALTH OF KENTUCKY; AND C. THOMAS BENNETT,
IN HIS OFFICIAL CAPACITY AS COMMISSIONER,
DEPARTMENT OF FISH AND WILDLIFE RESOURCES,
COMMONWEALTH OF KENTUCKY

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: DYCHE, JOHNSON AND KNOFF, JUDGES.

JOHNSON, JUDGE: Rockwell International Corporation has appealed from an order of the Franklin Circuit Court entered on October 11, 2000, which dismissed Rockwell's complaint seeking a

declaratory judgment against Jimmy D. Helton, in his official capacity as Secretary of the Cabinet for Health Services; James E. Bickford, in his official capacity as Secretary of the Natural Resources and Environmental Protection Cabinet; Ann R. Latta, in her official capacity as Secretary of the Tourism Development Cabinet; and C. Thomas Bennett, in his official capacity as Commissioner of the Department of Fish and Wildlife Resources (collectively the Appellees). Having concluded that Rockwell pleaded a justiciable controversy, we reverse and remand.

From 1957 to 1989, Rockwell owned and operated a plant in Russelville, Logan County, Kentucky, which manufactured gas meter components and typewriter housings. In its manufacturing process, Rockwell used a hydraulic fluid that contained polychlorinated biphenyls (PCBs). Although Rockwell underwent a conversion to non-PCB based hydraulic fluid in 1975, the Natural Resources and Environmental Protection Cabinet (NREPC) discovered PCBs still present at the facility as late as 1985.

Further testing and investigation revealed PCBs in the sediments of the Town Branch Creek and the Mud River and in adjacent flood plain surface soils. The NREPC concluded that the PCB contamination was due to waste runoff from the Rockwell plant. Runoff flows into the Town Branch Creek through three drainage tributaries called North Ditch, South Ditch, and East Ditch. The Town Branch Creek flows into the Mud River, and the Mud River extends 64 miles from its confluence with the Town Branch Creek to the Green River.

In 1986, the NREPC filed a complaint against Rockwell in the Franklin Circuit Court. The complaint sought enforcement of Kentucky's environmental laws through injunctive relief. For the next nine years, the trial court entered a series of agreed interim orders between Rockwell and the NREPC. In 1995, Rockwell submitted a final remediation plan to the NREPC, which was rejected. The NREPC then sought a trial date.

Following the submission of evidence, the Franklin Circuit Court on March 24, 1997, entered a judgment holding Rockwell in violation of several environmental statutes and regulations. The trial court enjoined Rockwell to correct the violations and ordered Rockwell to pay the NREPC its actual and necessary costs. The trial court expressly reserved the right to impose civil penalties if the ordered remediation and cleanup were not completed within a reasonable time. On August 13, 1999, this Court affirmed the decision of the Franklin Circuit Court¹.

Independent of its suit against Rockwell, in September 1985, the former Cabinet for Human Resources (now the Cabinet for Health Services (CHS)), the NREPC, and the Department for Fish and Wildlife Resources (DFWR) issued a fish consumption advisory, recommending that pregnant women and small children not eat fish from either the Town Branch Creek or the Mud River. Around the same time, Rockwell undertook a program to determine the extent

¹Rockwell International Corp. v. Natural Resources & Environmental Protection Cabinet, Ky.App., 16 S.W.3d 316 (1999).

of PCB contamination near its plant, to prevent further PCB releases, and to clean up existing contamination.

In August 1986, the DFWR upgraded the existing fish consumption advisory to a warning that no one eat fish caught in the Town Branch Creek or the Mud River. The DFWR posted warning signs at intervals along the two bodies of water. The signs stated: ~~A~~ Do not eat fish caught in Town Branch or the Mud River from the Hancock Lake Dam to Green River. These fish are a potential health risk as they are contaminated with PCBs (polychlorinated biphenyls). For further information please contact the Barren River Health Department . . . @ Rockwell has repeatedly requested that the warning be terminated, arguing that the warning is unnecessary because fish in both bodies of water test below the federal Food and Drug Administration (FDA) accepted level of 2.0 parts per million of PCB content.

Despite Rockwell's pleas, the original warning remained in effect until January 28, 1999. On that date, CHS and NREPC issued an updated warning that declared:

Following are consumption precautions for various tested species in Mud River and Town Branch. The advise is based on a meal of ½ pound of fish (before cooking) eaten by a 150-pound individual.

Town Branch Fish should not be consumed from any portion of Town Branch. This includes all species and all sizes.

Mud River Fish which feed on the bottom, such as catfish, carp, suckers and drum should not be eaten. Game fish such as bass, sunfish and crappie may be eaten, but not more than six meals per year. Women of childbearing age and children should not eat any fish from Mud River [emphasis original].

The reissued warning claimed to be based on test data gathered between 1996 and 1998. The new warning also changed the PCB contamination standard from the former FDA guidelines to a new federal clean water mandate developed for the Great Lakes region, known as the Great Lakes Protocol (GLP).²

Since 1985, Rockwell has spent a considerable amount of money remediating and testing the Mud River/Town Branch Creek area. While the Franklin Circuit Court retains jurisdiction over the cleanup efforts, Rockwell asserts that no court supervision exists in regard to the appellees' issuance of fish consumption warnings based on ever-changing PCB-contamination standards. Rockwell claims that the fish consumption warning has harmed and continues to harm it in a variety of ways. It is with this in mind that Rockwell brought the present action.

On March 9, 2000, Rockwell filed a complaint against the appellees in the Franklin Circuit Court.³ The complaint sought injunctive and declaratory relief. Specifically, the complaint alleged that the reissued fish consumption warning violated Kentucky law because it was based on an improper

²The NREPC claims that the Great Lakes Protocol is used by the member states of the Ohio River Valley Water Sanitation Commission, of which Kentucky is a member state. See KRS 224.018-760.

³Rockwell had previously filed an action (#4:99CV-15-M) in the United States District Court for the Western District of Kentucky. The lawsuit was dismissed on August 26, 1999, on the grounds that Rockwell failed to meet the minimal constitutional requirement for standing. On appeal, the Court of Appeals for the Sixth Circuit affirmed.

standard (the GLP). Rockwell also alleged a violation of its due process and equal protection rights under the United States and Kentucky Constitutions, arguing that the new warnings are arbitrary and capricious. In response, the appellees filed a joint motion to dismiss, claiming that Rockwell had failed to plead a justiciable controversy. The appellees also argued that Rockwell's claims were precluded by the doctrine of collateral estoppel. The Franklin Circuit Court granted the appellees' motion on October 11, 2000, on the basis that Rockwell had failed to plead a justiciable controversy. Rockwell then filed a motion to alter, amend or vacate the order. That motion was denied by the trial court on February 8, 2001. This appeal followed.

KRS⁴ 418.040 enables a plaintiff to seek a declaration of rights when an ~~A~~actual controversy~~@~~exists. When a motion to dismiss a declaratory action is filed, the question presented to the circuit court is not whether the plaintiff will ultimately prevail, but whether the complaint states a cause of action for declaratory relief.⁵ As Rockwell noted in its brief on appeal, the complaint must be construed in the light most favorable to the plaintiff and all allegations must be taken as true⁶. Therefore, the issue on appeal is whether the Franklin Circuit

⁴Kentucky Revised Statutes.

⁵Curry v. Coyne, Ky.App., 992 S.W.2d 858, 859 (1998)(citing City of Louisville v. Stock Yards Bank & Trust Co., Ky., 843 S.W.2d 327, 328 (1992)).

⁶Id. (citing Whittington v. Whittington, Ky.App., 766 S.W.2d 73, 74 (1989)).

Court erred when it determined that Rockwell failed to state a cause of action for declaratory relief.

Rockwell argues that a justiciable controversy exists because the appellees exceeded their legal authority when they issued the 1999 fish consumption warning for the Town Branch Creek and the Mud River. Rockwell contends that the issuance of fish consumption warnings based on the GLP constitutes an arbitrary and capricious exercise of governmental authority. As damages, Rockwell claims a diminution in property value, the incurrence of additional environmental testing costs, the incurrence of legal fees to defend civil suits brought against it by nearby landowners, and damages to its business reputation.

To sustain an action for declaratory relief there must be a justiciable controversy involving the rights of the parties.⁷ The plaintiff must have a present or substantial interest in the outcome of the litigation.⁸ A justiciable controversy does not include questions 'which may never arise or which are merely advisory, or are academic, hypothetical, incidental or remote, or which will not be decisive of any present controversy.⁹ A mere difference of opinion is not an

⁷Id. at 860 (citing HealthAmerica Corp. of Kentucky v. Humana Health Plan, Inc., Ky., 697 S.W.2d 946, 948 (1985)).

⁸Yeoman v. Commonwealth of Kentucky, Health Policy Board Ky., 983 S.W.2d 459, 473 (1998)(citing Winn v. First Bank of Irvington, Ky.App., 581 S.W.2d 21, 23 (1979)).

⁹Curry, supra at 860 (quoting Dravo v. Liberty National Bank & Trust Co., Ky., 267 S.W.2d 95, 97 (1954)).

actual controversy. . . .¹⁰ Courts do not adjudicate differences of opinion between the parties; courts adjudicate actual controversies involving legal rights.¹¹

We hold that Rockwell pleaded a justiciable controversy and that the Franklin Circuit Court erred when it dismissed Rockwell's complaint. While standards for safe fish consumption are matters within the sound discretion of the appellees, that discretion is not beyond review. The advisory must be reasonable and free from arbitrariness and capriciousness. As a landowner adversely affected by the fish consumption advisory, we believe Rockwell should have an opportunity to demonstrate that the advisory does not meet constitutional standards. Whether Rockwell will ultimately prevail in its claim is of no import. At this stage of the litigation, all allegations in Rockwell's complaint must be taken as true.¹² Rockwell is entitled to judicial review of this administrative action.¹³

The appellees argue in the alternative that even if Rockwell has pleaded a justiciable claim, that Rockwell is precluded from challenging the advisory by the doctrine of collateral estoppel, or issue preclusion as it is sometimes

¹⁰Jefferson County v. Chilton, 236 Ky. 614, 33 S.W.2d 601, 605 (1930).

¹¹Curry, supra.

¹²Id. at 859.

¹³See HealthAmerica Corp., supra; see also Foster v. Goodpaster, 290 Ky. 410, 161 S.W.2d 626 (1942).

called. In order for issue preclusion to be used as a bar to further litigation, certain elements must be present:

First, the issue in the second case must be the same as the issue in the first case. Second, the issue must have been actually litigated. Third, even if an issue was actually litigated in a prior action, issue preclusion will not bar subsequent litigation unless the issue was actually decided in that action. Fourth, for issue preclusion to operate as a bar, the decision on the issue in the prior action must have been necessary to the court's judgment [citations omitted].¹⁴

We hold that Rockwell is not barred by issue preclusion from challenging the fish advisory. In the 1997 action initiated by the NREPC, the issue was whether Rockwell had violated Kentucky's environmental laws by releasing PCBs into the area surrounding its Logan County facility. In the current action the issue is whether the appellees' issuance of the 1999 fish consumption advisory is reasonable and constitutional. This issue was never actually litigated in the prior action. While the issues in the federal lawsuit were similar to those before us, the CHS only argues in its brief that [a]s to any allegation of federal constitutional issues, the federal court order would be dispositive. We agree, but obviously that still leaves the state constitutional claims to be decided by the state court.

For the reasons stated above, we reverse the order of the Franklin Circuit Court and remand this matter for further proceedings consistent with this Opinion.

¹⁴Yeoman, supra at 465.

ALL CONCUR.

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