

RENDERED: OCTOBER 3, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000908-MR  
&  
NO. 2007-CA-000973-MR

MARY LASSITER, IN HER OFFICIAL  
CAPACITY AS STATE BUDGET  
DIRECTOR

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT  
v. HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 06-CI-01151

AMERICAN EXPRESS TRAVEL  
RELATED SERVICES  
COMPANY, INC.

APPELLEE/CROSS-APPELLANT

### OPINION AND ORDER DISMISSING

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BEFORE: MOORE AND THOMPSON, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

HENRY, SENIOR JUDGE: Mary Lassiter, in her official capacity as the State Budget Director, appeals from a judgment of the Franklin Circuit Court which granted declarative and injunctive relief to American Express Travel Related Services Company, Inc. (AmEx), after determining that a section of the state budget that shortened the period after which a traveler's check is presumed abandoned was unconstitutional. AmEx has cross-appealed, arguing that the circuit court erred in ruling that the Budget Director was a necessary party to the litigation.

Kentucky's Unclaimed Property Act, found at Kentucky Revised Statutes (KRS) Chapter 393, governs the custody and disposition of unclaimed or abandoned property, including traveler's checks. KRS 393.060 provides that traveler's checks are presumed abandoned if they have been outstanding for more than fifteen years.

The following property held or owing by a banking or financial organization is presumed abandoned:

...

(2) Any sum payable on checks certified in this state or on written instruments issued in this state on which a banking or financial organization or business association is directly liable, including, by way of illustration but not of limitation, certificates of deposit, drafts, money orders, and traveler's checks, that with the exception of traveler's checks has been outstanding for more than seven (7) years from the date it was payable, or from the date of its issuance if payable on demand, or, in the case of traveler's checks that has been outstanding for more than fifteen (15) years from the date of its issuance unless the owner has within seven (7) years or within fifteen (15) years in the case of traveler's checks corresponded in

writing with the banking or financial organization concerning it, or otherwise indicated an interest as evidenced by a memorandum on file with the banking or financial organization[.]

KRS 393.060(2).

Property that is presumed to be abandoned is taken into custody by the Treasurer, although ownership of the property does not vest in the state at that time.

If any intangible property is turned over to the department on presumption of abandonment, in accordance with KRS 393.060 to 393.120, the State Treasurer may at any subsequent time institute proceedings to establish conclusively that it was actually abandoned, or that the owner has died and there is no person entitled to it.

KRS 393.230(2).

[T]he scheme of KRS Chapter 393 seems to be that the appellant [the state] is to have the custody of property . . . when a presumption of abandonment takes place. Until the property has been adjudged by a court of competent jurisdiction to be actually abandoned, the property does not escheat to the state, and until that time the owner still is entitled to regain its possession from the appellant.

*Commonwealth by Geary v. Johnson*, 668 S.W.2d 569, 570 (Ky.App. 1984).

The Executive Branch biennial budget for 2006-2008, which became effective on April 25, 2006, contained the following provision:

**Abandonment of Traveler's Checks:** Notwithstanding KRS 393.060, traveler's checks held or owing by a banking or financial organization shall be presumed abandoned when the period of time the traveler's checks have been outstanding exceeds seven years . . .

HB 380, Part III, Section 39 (*see* 2006 Ky. Acts Ch. 252, pp. 261-262). Section 39 thus shortened by eight years the period after which a traveler's check is presumed to be abandoned, and thereby accelerated the deadline by which the state was entitled to take custody of the proceeds and begin collecting interest income. The Legislature reduced the statutory period as a revenue-raising measure. The change was projected to raise \$2.4 million in the fiscal year 2006-2007, and another \$400,000 in fiscal year 2007-2008. As an issuer of traveler's checks, AmEx was adversely affected because it shortened by eight years the period during which AmEx could collect interest income on the proceeds of the unredeemed checks.

AmEx filed suit against the Department of Treasury and the Treasurer in his official capacity on August 17, 2006. The Complaint sought injunctive relief prohibiting the defendants from enforcing Section 39 and to have Section 39 declared unconstitutional. On October 19, 2006, the trial court entered an order staying enforcement of Section 39. This order was extended by an additional sixty days on November 16, 2006.

On October 12, 2006, the Treasurer filed a Motion to Join Persons Needed for Just Adjudication, seeking to join the State Budget Director and the Director of the Legislative Research Commission as defendants. The trial court granted the motion as to the State Budget Director, and denied it as to the Director of the LRC.

AmEx moved for summary judgment on September 22, 2006. The defendants filed separate responses. On January 31, 2007, the circuit court entered

an order granting the motion and permanently enjoining the enforcement of Section 39, reasoning that the section violates Section 51 of the Kentucky Constitution because it revises a statute in order to raise revenue rather than merely to suspend an appropriation as occurred in *Armstrong v. Collins*, 709 S.W.2d 437 (Ky. 1986). By its order dated April 3, 2007, the circuit court denied the Budget Director's motion to alter or amend the circuit court's judgment.

On May 3, 2007, the Budget Director filed a notice of appeal of the judgment. The body of the notice stated that the Treasurer was not a party against whom the appeal was taken. The Treasurer did not file a notice of appeal. On May 10, 2007, AmEx filed a cross-appeal of the circuit court's decision to join the Budget Director as a defendant. On July 10, 2007, AmEx filed a motion to dismiss the Budget Director's appeal for failure to join an indispensable party, the Treasurer. On February 26, 2008, the Kentucky Department of Treasury notified the court that one of their counsel had withdrawn his representation, but that the Department continued to be represented by an Assistant Attorney General. AmEx responded with a motion to strike the notice of withdrawal and substitution on the ground that the Treasurer was not a party to the appeal. This motion, as well as the AmEx's earlier motion to dismiss the appeal, was passed to this panel for resolution.

We address first AmEx's motion to dismiss. AmEx argues that the Budget Director failed to name an indispensable party to the appeal – one of the defendants in the action before the circuit court, the Treasurer.

It is well-established that failure to name an indispensable party in the notice of appeal results in dismissal of the appeal. Ky. R. Civ. P. 19.02; *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky.1990). The failure to name an indispensable party in the notice of appeal is considered a jurisdictional defect. *Id.*

*Slone v. Casey*, 194 S.W.3d 336, 337 (Ky.App. 2006).

Kentucky Rules of Civil Procedure (CR) 73.03(1) provides that

The notice of appeal shall specify by name all appellants and all appellees (“et al.” and “etc.” are not proper designation of parties) and shall identify the judgment, order or part thereof appealed from. It shall contain a certificate that a copy of the notice has been served upon all opposing counsel, or parties, if unrepresented, at their last known address.

The caption of the Budget Director’s notice of appeal named as plaintiff “American Express Travel Related Services Company, Inc.” It named as defendant “Commonwealth of Kentucky, Kentucky Department of Treasury, et al.”

The body of the notice stated as follows:

Pursuant to CR 73.03, notice is given that the Defendant, Bradford L. Cowgill, in his official capacity as State Budget Director, hereby appeals to the Kentucky Court of Appeals from the Judgment entered by this Court on January 31, 2007 . . . .

Appellant is Bradford L. Cowgill in his official capacity as State Budget Director. The name of the Appellee against whom this appeal is taken is American Express Travel Related Services Company, Inc., the plaintiff in this proceeding.

The Commonwealth of Kentucky, Kentucky Department of Treasury, Jonathan Miller, Treasurer, was also a defendant in this proceeding, *but is not a party against whom this appeal is taken.*

(Emphasis added).

The Budget Director argues that the fact that Miller's name is contained in the body of the notice is sufficient for him to be deemed a party to the appeal under *Morris v. Cabinet for Families and Children*, 69 S.W.3d 73 (Ky. 2002) and *Blackburn v. Blackburn*, 810 S.W.2d 55 (Ky. 1991). In *Morris*, it was held that naming a child solely in the caption of the notice was sufficient to make the child an appellee. The court explained its reasoning as follows:

In *Blackburn v. Blackburn*, Ky., 810 S.W.2d 55 (1991), this Court held that a notice of appeal was adequate under CR 73.03 if it contained a listing of parties sufficient to give the opposing party notice of the identities of the parties against whom the appeal was filed. The principal objective of a pleading is to give fair notice to the opposing party. *Id.* at 56, citing *Lee v. Stamper*, Ky., 300 S.W.2d 251 (1957).

*Morris v. Cabinet for Families and Children*, 69 S.W.3d 73, 74 (Ky. 2002).

Here, however, the Treasurer was not specifically named in the caption, nor did the notice of appeal give the opposing party notice of the identities against whom the appeal was filed. Indeed, the Treasurer was specifically excluded as an opposing party by the terms of the body of the notice, which positively informed the Court that the Treasurer was **not** a party against whom the appeal was being taken. This Court has held that naming an indispensable party in an incorrect legal capacity is fatal to the appeal. *Slone*, 194 S.W.3d at 337. The same principle applies here.

Failure to name a party “is not grounds for dismissing the appeal unless the omitted party is an indispensable party to the appeal.” *Schulz v.*

*Chadwell*, 548 S.W.2d 181, 184 (Ky.App. 1977). “Whoever is a party to the record in the court below, and would be a necessary party to any further proceedings after the reversal of the judgment, must be a party to the appeal.”

*Land v. Salem Bank*, 279 Ky. 449, 130 S.W.2d 818, 821 (1939) (citation omitted).

“Failure to specify any party whose absence prevents the appellate court from granting complete relief among those already parties would be fatal to the appeal.”

*Braden v. Republic-Vanguard Life Ins. Co.*, 657 S.W.2d 241, 243 (Ky. 1983) citing *Levin v. Ferrer*, 535 S.W.2d 79 (Ky. 1975).

AmEx has argued that the Treasurer is a necessary party to this appeal because he is the only state official with the power to enforce KRS 393.060, and is therefore the sole entity bound by the trial court’s injunction, which was not directed at any specific party. KRS 393.230(1) provides that

[i]f any person or the agent of any court refuses to pay or surrender intangible property to the department as provided in KRS 393.060 to 393.110, an equitable proceeding may be brought on the relation of the State Treasurer to force payment or surrender. All property subject to KRS 393.060 to 393.110 may be listed and included in a single action.

KRS 393.240(1) further provides that

[i]f any person has property coming within the purview of KRS 393.020 to 393.050, and also of KRS 393.060 to 393.110, the actions required to be brought by the county attorney and the State Treasurer may be joined, but joinder is not required, and if separate actions are brought, they shall not be considered as coming within the rule against splitting a cause of action. The county attorney is not charged with the duty of enforcing sections KRS 393.060 to 393.120, 393.150, or 393.160.

AmEx argues that the Treasurer's failure to appeal the circuit court's ruling has rendered the injunction final and binding against the only officer authorized to enforce the statute against AmEx. Even if the judgment was reversed on appeal, AmEx asserts, the outcome as to AmEx could not be changed. "Only the parties to an appeal are bound by the appellate court's disposition of the proceeding." *Levin v. Ferrer*, 535 S.W.2d 79, 82 (Ky. 1976).

AmEx further argues that the Treasurer's absence means that there is no "actual controversy" remaining between the parties to this appeal since the Treasurer is the only individual with any enforcement powers and hence the only entity bound by the injunction. Consequently, AmEx asserts, this appeal is moot.

The Budget Director contends that because the statutory scheme in question is self-effectuating, i.e., the statute requires AmEx to turn over the proceeds from the presumptively abandoned traveler's checks to the Treasury without any action on the part of the Treasurer, an enforcement action by the Treasurer is not a necessary precondition to compliance by AmEx. Only an unlawful refusal on AmEx's part to comply with the statute would trigger the provisions of KRS 393.230(1). He contends that "[t]he statute that requires action is KRS 393.110, and it requires action by AmEx . . . not by the Treasurer."

KRS 393.110 provides as follows:

The [Treasury] department shall promulgate administrative regulations prescribing the reports which shall be filed with the department by persons holding property presumed abandoned, including the date for

filing reports, the contents of the reports, the coverage period of the reports, identifying information concerning the property and presumptive owner if known, the manner in which property shall be transferred from the person holding it to the department, requirements for providing notice to a person who may be the owner of property presumed abandoned, legal actions that may be taken to claim property presumed abandoned, and any other necessary and relevant information needed by the department to carry out the responsibilities concerning unclaimed property prescribed in this chapter. The department shall, notwithstanding KRS 424.180 and 424.190, provide on an annual basis notice or published advertisement of property transferred to it. Any procedures prescribed by the department in accordance with this section shall employ the most cost-effective methods available for the submission of reports to the department and the notice or advertisement of property transferred to the department.

KRS 393.110.

Under the terms of this statute, the Treasurer is bound to promulgate regulations in order to enforce the terms of KRS 393.060, or Section 39. In *Monticello Electric Plant Bd. v. Board of Ed. of Wayne County*, 310 S.W.2d 272 (Ky. 1958), a dispute arose between the plant board (a city agency) and a light company with whom the board had contracted to purchase some properties. The dispute centered on which of the parties should pay taxes for the year in which the properties were sold. The court held that the plant board could not prevail on appeal, in part because “the board has not named the Kentucky Tax Commission as an appellee. The commission is the party whose action is sought to be controlled by the judgment, and it appears to us to be an essential party to the appeal.” *Id.* at 273. In this case, although AmEx is bound to follow the law and turn over the

proceeds from the traveler's checks, much as the parties in *Monticello* were bound to pay state income tax, action must be taken by the Treasurer to promulgate regulations to govern this process. Should Section 39 be deemed constitutional, action would be required on the Treasurer's part to revise the existing regulations to reflect the shortened period of abandonment. Similarly, in *Hammond v. Department for Human Resources*, 652 S.W.2d 91 (Ky.App. 1983), this Court held that the State Personnel Board was a necessary party to an appeal in a case involving an employee dismissed by the Department for Human Resources. The Board was required by statute to be a party in the appeal to the circuit court and it was deemed illogical not to require the Board also to be a party in the appeal to this Court, "[f]or not only will such Board be bound by the final opinion and decision of the appellate Court, but, in addition, it may well be instructed or directed to take some further action." *Id.* at 92.

Finally, in *Boyd & Usher Transport v. Southern Tank Lines, Inc.*, 320 S.W.2d 120 (Ky. 1959), it was held that the Department of Motor Transportation was an indispensable party to an appeal concerning tariffs imposed on trucking companies, even though it was not an adversary in the proceedings, because its "functions and duties . . . will be directly affected" by the decision on appeal. *Id.* at 123-124. Similarly, in this case, the Treasurer is not strictly speaking an "adversary" in the proceedings because he is bound to enforce whatever version of the statute is deemed constitutional, but his functions and duties as they are set forth in KRS 393.110 would be directly affected by our decision on appeal.

Even more significant, however, is the fact that the Treasurer remains bound by the lower court's injunction. Without the Treasurer's presence as a party, the Budget Director is effectively seeking an advisory opinion.

The party responsible for enforcement of the allegedly unconstitutional statute must be the defendant against whom suit for declaratory relief is brought . . . . In the absence of that party, the petitioner merely requests an advisory opinion.

*City of Longview v. Head*, 33 S.W.3d 47, 54 (Tex.App. 2000).

A restraining order granting injunctive relief against the enforcement of a statute or ordinance is to be directed against the acts of those specific public officials charged with enforcing the statute to enjoin their threatened enforcement. *Akers v. Floyd County Fiscal Court, Ky.*, 556 S.W.2d 146 (1977) (citing 42 Am.Jur.2d § 186).

*Commonwealth v. Mountain Truckers Ass'n, Inc.*, 683 S.W.2d 260, 263 (Ky.App. 1984).

We are persuaded by the reasoning in a factually similar case from the Court of Appeals for the Seventh Circuit, *Kendall-Jackson Winery, Ltd. v. Branson*, 212 F.3d 995 (7<sup>th</sup> Cir. 2000). In that case, a group of suppliers of wine and spirits brought suit alleging that the Illinois Wine and Spirits Industry Fair Dealing Act was unconstitutional for interfering with their agreements with distributors. The federal district court granted a preliminary injunction enjoining the enforcement of the Act by the Illinois Liquor Control Commission. The suppliers then dropped their old distributors, who appealed. The Commission did not appeal, however. The appellate court concluded that

[b]ecause the Commission has not appealed, it remains bound by the injunctions no matter what happens on the distributors' appeals, so it is not clear what point the distributors' appeals can serve. *Penda Corp. v. United States*, 44 F.3d 967, 971 (Fed.Cir.1994).

...

[T]he distributors miss the real problem: redressability. Sure the injunction injures them, but how can their appeal redress that injury given that the injunction will continue to bind the Commission?

*Kendall-Jackson*, 212 F.3d at 997-998.

The party whose conduct is being enjoined is an indispensable party to the appeal. To paraphrase the opinion of the Seventh Circuit Court of Appeals, because the Treasurer has not appealed, he remains bound by the injunction no matter what happens on the Budget Director's appeal, so it is not clear what point the Director's appeal can serve. The Budget Director has addressed this point by arguing that even if the Treasurer's failure to appeal resulted in claim preclusion between AmEx and the Treasurer, the Budget Director could still obtain complete relief as to AmEx through a mandatory injunction compelling AmEx to comply with the statute. Apart from the fact that this would not solve the problem of the advisory appeal, "[a]n indispensable party is one whose absence prevents the Court from granting complete relief among those already parties." *Milligan v. Schenley Distillers, Inc.*, 584 S.W.2d 751, 753 (Ky.App. 1979). The need to seek such an injunction after the appeal confirms that complete relief could not be granted to the Budget Director by this Court.



named as an appellant but presumably would not retain counsel, file a brief, or otherwise participate in the proceedings. The futility in such a purely technical requirement is certain where, as here, the named appellant and the omitted party represent identical interest, the Commonwealth of Kentucky.

The majority is persuaded that the permissive language in KRS 393.060 that the Treasurer “may” enforce the statute in question confers such authority exclusively within his purview and, as a result, the Treasurer has the sole interest in the outcome of this appeal. I conclude that the majority’s initial proposition is faulty and, as consequence, its conclusion equally flawed.

On numerous grounds, I cannot agree that the Treasurer is necessary to properly adjudicate this appeal. Had the General Assembly intended that the Treasurer be the sole enforcer of the statute, it would have used the mandatory term “shall.” It remains that the Governor retains the power to direct that the statute be enforced by other representatives of the Executive Branch such as the Attorney General or the Department of Revenue. Moreover, the Budget Director and the Treasurer both represent the Commonwealth. Thus, it cannot be said that either was without notice of the appeal or their interest left unrepresented. Finally, the issue in this case is whether the statute is constitutional. If it is not, the Treasurer cannot enforce its provisions. This is true whether he is, or is not, a party to this appeal.

I believe that this case requires that we follow the view taken in *Commonwealth of Kentucky, Department of Revenue v. Schmid*, 404 S.W.2d 458

(Ky. 1966), where the Court concluded that, although the Department of Revenue was an indispensable party, a taxpayer's appeal was not fatally flawed when only the Attorney General had been named as a party. The Court's reasoning was sound when it stated that by naming the Attorney General as a party, the state government, including any of its involved agencies were likewise parties to the appeal. The Court further emphasized that since the Department of Revenue was aware of the litigation, it had suffered no harm by the failure to formally be designated as a party. *Id.* at 458.

I firmly believe that this Court should follow the common sense view taken in *Schmid* and review the merits of this case which present a legitimate constitutional challenge. The legislation at issue was not a suspension and is a revenue-raising statute hidden within a 666-page budget bill that was forwarded to the General Assembly shortly before the vote. It is a substantive change that I believe deserves Section 51 scrutiny. Prior to a vote, such legislation must be published as a separate measure with notice to the members of the General Assembly and the public, who have the ability to argue and contemplate its ramifications.

For the reasons stated, I would not dismiss the appeal on the technical ground advanced by the majority and instead decide the merits of this significant constitutional challenge. As to the merits, I would affirm the trial court that this legislation is unconstitutional.

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ORAL ARGUMENT FOR  
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