

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002545-MR

WILLIAM PORTER and
BARBARA PORTER

APPELLANTS

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES J. HICKMAN, JUDGE
ACTION NO. 06-CI-00702

SHELBYVILLE CEMETERY COMPANY
aka GROVE HILL CEMETERY
COMPANY; CHARLES T. LONG;
J. ROBERT WALTERS; GUTHRIE
GOODMAN, III; ANN KINSOLVING;
ELLEN TOPMILLER; and
EDGAR VAUGHN, III

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; CAPERTON AND CLAYTON, JUDGES.

COMBS, CHIEF JUDGE: William Porter and Barbara Porter appeal from an
opinion and order of the Shelby Circuit Court that dismissed their complaint

against Shelbyville Cemetery Company (d/b/a Grove Hill Cemetery Company) and six members of its board of trustees. At the time they filed the complaint, Appellant Barbara Porter was acting as a *de facto* trustee of Grove Hill, but neither of the Porters was a member of the nonprofit corporation. Nevertheless, the Porters filed a derivative action on behalf of Grove Hill alleging numerous breaches of the articles of incorporation by Barbara's fellow board members.

The sole issue properly before us is the argument raised by the Porters in the trial court: that Barbara's role as a corporate fiduciary entitles her to the same standing that a stockholder of a private business corporation would have to bring a derivative action to enforce the rights of the corporation. The trial court was not persuaded and dismissed the complaint. After our review, we affirm.

Shelbyville Cemetery Company is a nonprofit corporation governed by the provisions of Kentucky Revised Statutes (KRS) Chapter 273. It was chartered by the Commonwealth on March 1, 1854. At that time, the Kentucky Constitution of 1850 was in effect. The General Assembly amended the cemetery's articles of incorporation in 1871 to provide for corporate governance by nine trustees, each of whom had to own at least one burial plot in the cemetery. Pursuant to the 1871 amendment, three of these trustees were to be elected annually by the plot owners. The amendment also provided that Grove Hill:

shall be constituted and composed only of those persons who have heretofore purchased and paid, and who may hereafter purchase and pay for lots, and have received certificates of ownership therefor in the cemetery grounds owned and held by said corporation.

1871 Ky. Acts, Ch. 1547 §§3-4. Finally, the articles provided for the board of trustees to retain an accountant to audit the company's accounts at least once per year.

When Kentucky's current Constitution was adopted in 1891, the Constitution of 1850 was effectively repealed. At Section 59(17), the new Constitution prohibited the General Assembly from chartering private corporations. All existing corporations were statutorily mandated to amend their charters to comply with Chapter 32 of the Kentucky Statutes, which established Kentucky's first uniform corporate code. All corporations pre-dating the 1891 Constitution were also required to adopt a corporate resolution accepting the new Constitution and to designate a registered agent in the office of the Secretary of State.

Grove Hill failed to comply with any of the requirements of Chapter 32 and accordingly suffered the revocation of its corporate charter in 1897. As appellant's brief aptly observes, Grove Hill has operated as a de-chartered corporation continually since 1897 – neither *de jure* nor *de facto* as a matter of law. Appellant's brief at p. 4, citing 19 Am.Jur.2d, *Corporations*, § 2885 (1986).

When Grove Hill was originally incorporated in 1854, its charter recited that it was a “body politic and corporate” Section 1, Charter of 1854. As noted during oral arguments, Grove Hill attempted to amend its charter in 1910

– the same charter that had been revoked in 1897 and which has never been brought into conformity with the laws under the present Constitution.

Grove Hill has continued to operate regardless of its actual corporate status. It has often functioned as a matter of actual practice rather than in conformity with its by-laws as originally chartered and amended over the years. Grove Hill contends that it is a private, not-for-profit corporation. Barbara contends that it is a public – or at least a quasi-public – corporation.

Since 1959, it has been the practice of the board to appoint trustees rather than to elect them as provided in its original articles of incorporation. In March 1975, the board voted to amend the by-laws to reduce the number of trustees from nine to seven. As of the time that the record in this case was compiled, none of the board members has been duly elected by the lot owners since 1959. Pursuant to the appointment process, Barbara Porter was appointed trustee by the board in October 1998.

In 2005, the board decided to condemn a portion of the Porters' property for expansion of the cemetery.¹ The Porters objected to this decision. In an action contesting the cemetery's condemnation proceedings, the Porters asked the trial court to order the *de facto* members of the board to announce and to conduct a proper election of trustees. Presumably, the Porters anticipated that a re-constituted board might reconsider the decision to condemn the Porters' property. However, the court declined to consider the Porters' motion and held that issues

¹ The Porters note that by exercising the power of eminent domain in the condemnation action, Grove Hill is demonstrating its “quasi-public” – if not public – status.

related to the composition and administration of the board were not matters to be considered in conjunction with the condemnation action. The Porters did not pursue an appeal as to the *de facto* composition of the Grove Hill board in the context of the condemnation proceedings but instead have filed this separate lawsuit on behalf of the corporation.

In their complaint, the Porters alleged that none of the trustees has been validly elected to serve on the board. They also charged that the board has ignored their demand for it to schedule and conduct a valid election of its trustees. As a consequence, they sought to have the *de facto* board members immediately removed from office and a proper election held under the supervision of the court. In addition, they sought a court order compelling the board to submit to an annual audit and to prepare and to publish an annual report. At a meeting of the board held on January 16, 2007, Barbara Porter was removed from office.

On January 22, 2007, Grove Hill filed a motion to dismiss the complaint for lack of standing. The board contended that Barbara Porter was estopped from attacking the validity of its makeup because she had been appointed pursuant to the same process that she was now challenging and because she had served for ten years **without complaint** in her capacity as board member without the benefit of an election. Furthermore, Grove Hill argued that since she had been duly removed from office, she could no longer claim **any** judicially recognizable interest in the subject of the action. With respect to William Porter, the board

reiterated that he was neither a board member nor a property owner and that he had **never** had any judicially recognizable interest in the board or its composition.

On February 5, 2007, the Porters filed a motion requesting the court to rescind the board's decision to remove Barbara from office. Additionally, with respect to the board's motion to dismiss, they explained that "in an effort to get past the issue of standing," they had each tried to become members of the corporation by purchasing cemetery plots. The board refused to sell them the requested plots. The Porters argued that this refusal amounted to yet another instance of wrongdoing. They then requested the court to compel the cemetery to sell two burial plots to them, arguing that its status as a public corporation precluded the decision to refuse to sell burial plots to them.

In an order entered February 28, 2007, the trial court dismissed the Porters' action. With respect to William Porter, the trial court concluded that he had no standing whatsoever to pursue an action on behalf of the corporation. As to Barbara Porter, the court held that she, too, lacked a judicially recognizable interest sufficient to invoke the court's jurisdiction.

In a carefully reasoned analysis, the court concluded that the precisely circumscribed, statutory authority of *de facto* board members to act on behalf of a corporation was insufficient to serve as a basis for a derivative action brought to enforce the rights of a corporation. Although there is well accepted authority that a *de facto* trustee binds a corporation in its transactions with innocent third-parties, the trial court reasoned that a *de facto* trustee had no legal relationship whatsoever

with the corporation itself. According to the trial court, Barbara was never a member of the corporation because of her failure to own a burial plot; she was no longer a trustee either in law or in fact. Therefore, she lacked the necessary present, substantial, and judicially recognizable interest in the action to invoke jurisdiction and to maintain this action. Finally, the court observed that the Porters could not be affected personally by any judgment that the court might arguably pronounce. Since neither of them could cast a vote with respect to any issue concerning the cemetery and neither of them could lawfully serve on its board, the court's decision – regardless of its outcome – was legally irrelevant to them. Thus, the court concluded that the Porters were **legal strangers to the corporation** who could not invoke the court's jurisdiction. Accordingly, their action was dismissed. This appeal followed.

On appeal, the Porters contend that the trial court erred by concluding that Barbara lacked standing to bring a civil action to enforce Grove Hill's corporate rights. They argue that Barbara's status as a *de facto* trustee alone is an interest sufficient to justify their maintaining an action. They contest the common law's limitations on the authority of *de facto* directors to act and contend that the circumstances surrounding her inappropriate appointment to the board are not relevant. The Porters contend that as long as the interests of the public and third persons are involved, any and all of Barbara's actions as *de facto* trustee are authorized by law, and the court must redress their grievances.

The Porters contend that Grove Hill's *de facto* trustees "long ago shut off any measure of accountability to [the corporation's] burial lot owners."

Appellants' Brief at 17. They allege that the *de facto* trustees "have kept the lot owners in the dark for many years" and that the board's chairman has been permitted to "establish his fiefdom over Grove Hill which he has ruled with an iron fist." *Id.* The Porters argue that Barbara is a suitable advocate to enforce the interests of Grove Hill's shareholders. They contend that Barbara is the only person who has shown any concern for the best interests of the cemetery's plot owners. Invoking public policy and equitable principles, they urge this court to hold that a board member has the right to bring a derivative action for the same reasons that stockholders of a for-profit corporation are authorized to do so.

Since the court's judgment in this case involves a question of law, we review the decision *de novo*. We agree with the trial court that the power of *de facto* directors to act on behalf of a corporation is much more narrowly limited than the Porters acknowledge. However, we do not believe that an exhaustive discussion on that point is necessary. Rather, we believe it is sufficient to say that even if she were a duly elected, *de jure* director of Grove Hill, Barbara Porter would nevertheless lack the standing necessary to pursue the derivative claims that she has asserted on behalf of the corporation.

In order to invoke the jurisdiction of the court to enforce a claim, the plaintiffs must show that they have standing to do so. *J.N.R. v. O'Reilly*, 264 S.W.3d 587 (Ky. 2008). Standing to bring an action requires a personal interest,

often referred to as a “substantial” interest in the subject matter of the litigation as distinguished from a “mere expectancy.” *Housing Authority of Louisville v. Service Employment International Union*, 885 S.W.2d 962, 965 (Ky. 1994).

The issue of standing is concerned only with the question of **who** is entitled to mount a legal challenge rather than with the merits of the subject matter of the controversy. *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). It is a concept utilized to determine whether a party has shown a personal stake in the outcome sufficient to insure that a justiciable controversy is adequately presented to the court. *Black's Law Dictionary* 1405 (6th ed.1990). State courts apply the concept of standing as a matter of self-restraint to avoid rendering advisory opinions on matters instigated by parties who are merely “intermeddlers.” 59 Am.Jur.2d *Parties* § 36 (2002). Since the jurisdiction of the court is a prerequisite to commencement of any action, standing must exist **at the time the action is filed**. *Id.* at §37.

Standing for shareholders of private business corporations in derivative actions evolved from equitable principles. 19 Am.Jur.2d *Corporations* §1948 (2004). Where a corporation possessed a cause of action that it either refused or was unable to assert, equity permitted a stockholder to sue in his own name for the benefit of the corporation. *Id.* at §1946. The shareholder was authorized to pursue the action for the purpose of preventing injustice when it was apparent that the corporation's rights would not be protected otherwise. *Id.* However, derivative actions have not been traditionally favored in the law, and

eventually state legislatures began to enact various statutory requirements in order to regulate recourse to derivative actions as a remedy. *Id.* at §1959.

The General Assembly expressly provided in KRS Chapter 271B for derivative proceedings **by shareholders** against their **for-profit** corporations:

[a] person **shall not** commence a proceeding in the right of a domestic or foreign corporation **unless he was a shareholder of the corporation when the transaction complained of occurred** or unless he became a shareholder through transfer by operation of law from one who was a shareholder at that time. (Emphasis added.)

However, nothing in KRS Chapter 273 governing **nonprofit corporations** expressly authorizes derivative actions by either members or directors.

Nevertheless, the Porters argue that the court should recognize Barbara's right to sue since she is in the best position to know the facts and to be able to make allegations against the board. Regardless of any arguably equitable merit in their conviction, the fact remains that the General Assembly has spoken clearly and has exercised its plenary power over the issue. In light of the specific limitations enacted by our legislature, this court has no authority to recognize the right of a corporate director – acting in that capacity – to invoke the jurisdiction of the court by bringing an action on behalf of the nonprofit corporation in the name of or for the sake of its member. In two cases, *Willis v. Davis*, 323 S.W.2d 847 (Ky. 1959) and *Hollis v. Edmonds*, 616 S.W.2d 80 (Ky.App. 1981), our Supreme Court held that an action for injunctive relief is the proper remedy by which to enforce duties owed by officers of a nonprofit corporation to its members.

In light of disposition of this appeal, we refrain from analyzing the Porters' other contentions except to address a matter emphasized during oral argument. The Porters protest Grove Hill's refusal to sell cemetery plots to them so that they could "get past the issue of standing." They contend that Grove Hill is a public corporation and that, therefore, its refusal to sell them plots is arbitrary and illegal, thereby compelling a reversal of the trial court's decision that they lacked standing to pursue the derivative action.

The public *versus* private status of Grove Hill is not at all dispositive of (albeit decidedly distracting from) the heart of the standing issue. Nonetheless, we have carefully analyzed the few Kentucky cases that discuss the public or private characterizations of cemeteries, and they are contradictory and internally divided.

Both Grove Hill Cemetery in Louisville and the Lexington Cemetery were incorporated by a special act of the General Assembly in 1848 – as was Grove Hill in Shelbyville in 1854. All three cemetery charters recited that they were "a body politic and corporate." Their character as a public *versus* private entity, however, cannot be readily ascertained from language that on its face would seem to indicate more of a public purpose.

The two Kentucky cases construing these issues both involved the taxable nature of funds dedicated to cemetery maintenance and embellishment. Under Section 170 of our current Constitution, a private entity can be taxed while

its public counterpart is exempt from taxation. The courts have been clearly divided as to whether burial of the dead constitutes a public or private purpose.

In *Commonwealth v. Lexington Cemetery*, 70 S.W. 280 (Ky. 1902), our former Court of Appeals declined to equate the obviously public need to bury the dead with a purely public purpose. In finding the Lexington Cemetery to be a private entity subject to taxation, it reasoned as follows in a 5-2 decision:

Whilst we fully appreciate and approve the well-nigh universal sentiment that the graves of the dead should be decently and tenderly cared for, there can be no escape from the conclusion that appellee is not an institution of purely public charity, as contemplated by the constitution and statute.

Id. at 281.

The opposite result was reached in *Cave Hill Cemetery Company v. Scent*, 352 S.W.2d 61 (Ky. 1961), in which the Court rendered a 4-3 decision declaring the language “body politic and corporate” to indicate a public corporation having a public purpose.

In creating Cave Hill Cemetery Company as a “body politic,” the Legislature recognized the public nature of the Cemetery, recognized its public purpose, authorized its maintenance and development by the financial means mentioned, and retained **unto itself the legislative power to alter or modify the legal structure as the public interest may require**, even to the point of authorizing the levy of taxes for its preservation and maintenance in case the presently established methods of financing the Cemetery prove inadequate. In the peculiar factual situation before us for consideration, it seems to us that permitting the collection of an ad valorem tax by the Department of Revenue on any of the funds involved **would tend to thwart the obvious purpose of the**

Legislature – to make this public cemetery self-sustaining, and thus avoid the need of granting it support from public taxation. For these reasons we conclude that the funds involved are public property used for a public purpose within the meaning of Section 170 of the Constitution, and therefore exempt from taxation. (Emphasis added.)

Id. at 64.

Thus, the more recent judicial pronouncement on this issue would indicate that the operation of a cemetery is a public purpose regardless of how the cemetery itself characterizes its activity. Barbara urges that the public nature of Grove Hill requires that it sell a plot to her or to anyone demanding a sale. After reviewing the reasoning of the trial court, we agree that there is no precedent requiring a cemetery to sell a plot to an individual – with the clear *caveat* that “a public cemetery may not refuse to sell a plot on the basis of racial discrimination or discrimination of another protected class. *Terry, et al. v. Elmwood Cemetery*, 307 F.Supp 369 (D.C. Ala. 1969).” Opinion of the trial court at p. 7.

Thus, Barbara cannot compel Grove Hill to confer upon her standing to sue by forcing it to sell her a burial plot. However, even if she could leverage such an outcome, she still would not have standing at present to bring the action currently before us. Standing cannot be later acquired and then applied retrospectively to validate a cause of action originally lacking justiciability because of the absence of standing. The trial court expressed this concept more succinctly as follows: “Standing is required to bring a law suit and can not be acquired

midstream to create a present and substantial interest in the subject matter of the suit.” Opinion of the trial court at p. 9.

We affirm the judgment of the Shelby Circuit Court.

ALL CONCUR.

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