

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001052-MR

SCENIC KENTUCKY, INC.
AND STEPHEN PORTER

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 15-CI-01170

COMMONWEALTH OF KENTUCKY,
KENTUCKY TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS; AND
OUTDOOR ADVERTISING ASSOCIATION
OF KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: JOHNSON, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Scenic Kentucky, Inc. and Stephen Porter appeal from an order of the Franklin Circuit Court dismissing their declaratory judgment action seeking a declaration of rights as to the legality and constitutionality of two

Kentucky Administrative Regulations (KAR) promulgated by the Kentucky Transportation Cabinet. The circuit court ruled that neither Scenic nor Porter has standing to pursue the action. We agree with the circuit court that Porter does not have individual standing because he failed to show he has suffered or will suffer a specific injury distinct to him from that suffered by the public generally and, because Scenic does not have a member who has individual standing, Scenic cannot establish associational standing.

Scenic is a non-profit corporation under the laws of Kentucky, with a principal office in Louisville. Its stated mission is to “to preserve, protect, and enhance the scenic and aesthetic character of Kentucky’s communities and roadsides.” Porter is a Louisville resident and a Scenic board member.

In late 2015, the Kentucky legislature approved 603 KAR 10:021, which provides a regulatory framework for the use of electronic advertising devices. It also approved 603 KAR 5:155 allowing pruning and removal of trees and other vegetation located on public rights-of-way along Kentucky roadways obstructing visibility of those devices.

Shortly after the passage of the regulations, Scenic filed this declaratory judgment action pursuant to Kentucky Revised Statutes (KRS) 418.040 challenging the legality and constitutionality of 603 KAR 10:021 and 603 KAR 5:155. The complaint was accompanied by Porter’s affidavit. In addition to

stating that he is a Louisville resident and a current board member of Scenic, Porter stated he had driven past electronic advertising devices and was distracted by the changing messages putting his safety at risk. He also stated he personally enjoys trees and vegetation along Kentucky's rights-of-way. Finally, he stated that as a taxpayer, he has standing to challenge the constitutionality of granting a privilege to destroy public property for private purposes without compensation in violation of Section 3 and Section 177 of the Kentucky Constitution.¹

The Cabinet filed a motion to dismiss the complaint on numerous grounds, including lack of standing by either Scenic or Porter. On the same date, the Outdoor Advertising Association of Kentucky (OAAK) filed a motion to intervene and to dismiss. By agreement of the parties, OAAK was permitted to intervene. Shortly after the motions to dismiss were filed, Scenic and Porter filed

¹ Section 3 states:

All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment.

Section 177 states:

The credit of the Commonwealth shall not be given, pledged or loaned to any individual, company, corporation or association, municipality, or political subdivision of the State; nor shall the Commonwealth become an owner or stockholder in, nor make donation to, any company, association or corporation; nor shall the Commonwealth construct a railroad or other highway.

an amended complaint and petition for declaration of rights to clarify that Porter was a board member of Scenic and to add him, individually, as a plaintiff.

The circuit court concluded that Porter, individually, lacked standing and that Scenic lacked associational standing and dismissed the action. Scenic and Porter appealed.

The concept of standing and its relationship to justiciability, a separate but interrelated concept was explained in *Interactive Gaming Council v. Commonwealth ex rel. Brown*, 425 S.W.3d 107, 112 (Ky.App. 2014) (internal quotations and citations omitted):

Justiciability focuses on whether there is a live controversy for the court to decide. “Questions which may never arise or which are merely advisory, academic, hypothetical, incidental or remote, or which will not be decisive of a present controversy” do not present justiciable controversies.

Standing, a subset of justiciability, focuses on whether the parties before the court have a personal stake in the outcome of controversy. In order to have standing to sue, a plaintiff need only have a real and substantial interest in the subject matter of the litigation, as opposed to a mere expectancy. The purpose of requiring standing is to make sure that the party litigating the case has a personal stake in the outcome of the controversy such that he or she will litigate vigorously and effectively for the personal issues. The determination of a party’s standing requires consideration of the facts of each individual case.

To meet the “real and substantial interest” requirement, the plaintiff must show that the injury he suffered or will suffer is “different from suffered by the public as a whole. The difference must not only be in degree, but also in kind.” *Kemper v. Cooke*, 576 S.W.2d 263, 266 (Ky.App. 1979).

A trial court’s ultimate determination as to whether a party has standing is a matter of law that we review *de novo*. *Interactive Gaming Council*, 425 S.W.3d at 111. However, any factual findings necessary to that determination are entitled to deference and those findings based on substantial evidence will not be reversed. *Id.* “Substantial evidence” is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable people.” *Abbott Lab. v. Smith*, 205 S.W.3d 249, 253 (Ky.App. 2006).

The declaratory judgment statute does not circumvent the standing requirement. As stated in *HealthAmerica Corp. of Kentucky v. Humana Health Plan, Inc.*, 697 S.W.2d 946, 948 (Ky. 1985), “Chapter 418, the Declaratory Judgment Chapter, confers standing on a party only where there is a specific right involved.”

Porter contends that he has standing to challenge the regulations because he has suffered and will suffer the specific injury required for standing because of his aesthetic interest in preserving the scenic views along Kentucky roadways and his own safety interest in traveling those roadways. Although there

are some distinctions between this case and *Bailey v. Preserve Rural Roads of Madison County, Inc.*, 394 S.W.3d 350 (Ky. 2011), the facts are analogous.

In *Bailey*, the Court addressed whether Curtis Tate had standing to enjoin a private citizen from blocking a county road upon which the Madison Fiscal Court voted to discontinue maintenance. Tate did not own, lease or reside on the property accessed by the road but argued he had standing because the road met “a public need, [provided] a shortcut for him, and [gave] him access to many sites important to his family history.” *Id.* at 355. The Court rejected his argument reasoning as follows:

Tate argues that Appellant's blocking of Dunbar Branch Road forces him to take a longer route when he travels between certain locations. Yet, Tate does not and cannot argue that the blocking of Dunbar Branch Road has obstructed his access to his own property. He still has “reasonable access” to the county road system despite the potentially longer route he must take to certain locations. Additionally, while the closure of Dunbar Branch Road may prevent Tate from visiting sites connected with his family's heritage and history, he personally possesses no easement or right to have access to those locations. Therefore, Tate has failed to show that he has a specific injury different than any other member of the public and he does not possess standing to individually bring suit against Appellant.

Id. at 356 (internal citation and parenthetical information omitted).

Like Tate, Porter does not allege any damage distinct to him that would not be suffered by the public generally. Porter does not own property that

will be affected by the regulations nor does he assert that he will apply for a permit under the regulations. Moreover, he does not allege that any electronic advertising device will prevent his use of a public roadway. Porter's assertion that his aesthetic interests and his safety will be adversely affected by a hypothetical billboard located in a yet unknown location is nothing more than speculation at this point and not the real and substantial type of injury required for standing.

Porter also asserts standing based on his status as a taxpayer. "Kentucky has consistently recognized taxpayer standing to challenge the constitutionality of city, county and state taxes and expenditures." *Price v. Com., Transp. Cabinet*, 945 S.W.2d 429, 431 (Ky.App. 1996). However, [s]imply because a plaintiff may be a citizen and a taxpayer is not in and of itself sufficient basis to assert standing." *Fourroux v. City of Shepherdsville*, 148 S.W.3d 303, 306 (Ky.App. 2004) (quoting *City of Ashland v. Ashland F.O.P. No. 3, Inc.*, 888 S.W.2d 667, 668 (Ky. 1994)). To establish standing, Porter must show a direct interest in the regulations. *Id.* Moreover, as a threshold to taxpayer standing to challenge a statute or regulation, there must be an expenditure or generation of public funds pursuant to that statute or regulation. *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 473 (Ky. 1998).

Taxpayer standing is simply not an issue in this case. Putting aside Porter's failure to demonstrate any injury distinct from that suffered by the public

generally and the speculative nature of his claims of possible injury, the challenged regulations do not involve the generation or expenditure of public funds.

Scenic argues that it has standing based on the doctrine of associational standing. Associational standing allows “associations to sue in court to vindicate the rights of their members, even in the absence of an actual injury to the association.” *Interactive Gaming Council*, 425 S.W.3d at 113. Scenic, the entity claiming associational standing, had “the burden of proving the requirements to assert standing.” *Bailey*, 394 S.W.3d at 357.

In *Hunt v. Washington State Apple Advertising Com’n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977), the Supreme Court identified three requirements for an association to have standing to pursue an action on its members’ behalf:

(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

“Kentucky has never officially adopted [the] entire [*Hunt*] test.” *Bailey*, 394 S.W.3d at 356. However, the Kentucky Supreme Court has held that “at a minimum, to establish associational standing at least one member of the association must individually have standing to sue in his or her own right.” *Id.*

The Transportation Cabinet argues that Scenic cannot claim associational standing because its bylaws preclude it from having members and it cannot represent the interest of its board member, Porter. We do not need to either accept or reject the Transportation Cabinet's argument because we have determined that Porter does not have standing. Consequently, Scenic cannot establish associational standing. *Id.*

For the reasons stated, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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