

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002048-MR

CITY OF BURNSIDE, MAYOR DEAN E. LOVINS, DAVID
BAUGH, CHUCK FOURMAN, JIM RASNICK AND
BRIAN WATSON

APPELLANTS

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 05-CI-01054

CONRAD BRYANT, SHEILA CHRISTOPHER, WILLIAM
CHRISTOPHER, DON COGGINS, ALICE FITZGERALDS,
CHRIS FITZGERALDS, KENNETH H. WELLS, M.D.,
EVERETT HILL, AND JOANNE HILL

APPELLEES

OPINION REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: The City of Burnside, Mayor Dean E. Lovins, David Baugh, Chuck Fourman, Jim Rasnick and Brian Watson bring this appeal from an order of the Pulaski Circuit Court which denied their motion to dismiss and granted summary

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

judgment to the appellees, Conrad Bryant, Sheila Christopher, William Christopher, Don Coggins, Alice Fitzgeralds, Chris Fitzgeralds, Kenneth H. Wells, M.D., Everett Hill, and Joanne Hill. Because we agree with the appellants that the complaint filed by the appellees should have been dismissed since they lacked standing, we reverse.

In the summer of 2005, Burnside enacted an annexation ordinance pursuant to Kentucky Revised Statutes (KRS) 81A.410 et seq. KRS 81A.412 specifically permits a city to annex a contiguous or adjacent area if it obtains the consent of the owner(s).

Burnside sought to annex a strip or corridor of land stretching from the city limits along the shore of Lake Cumberland to encompass Lees Ford Marina Resort, which is located approximately eight miles away over land and fourteen miles over water. The corridor is owned by the United States Government, which consented to its annexation by the city.

According to the appellees, the annexation was accomplished solely to allow liquor sales at the Marina Resort because Burnside had previously, under local option election law, voted to become “wet.”

The plaintiffs in the case below were residents of Burnside, of whom two, Don Coggins and Conrad Bryant, were city council members who had voted against the annexation while serving in their official capacities. They filed suit in Pulaski Circuit Court against the City of Burnside, its mayor, and four council members who had voted for the corridor annexation. After some discovery was taken, the appellees moved for summary judgment, arguing that the annexation was illegal and improper. Burnside and

the other appellants moved to dismiss the complaint, asserting that the appellees did not have standing to challenge the annexation.

The circuit court entered an order denying the motion to dismiss, and granted summary judgment to the appellees, finding that the annexation ordinance violated KRS 81A.410 because the area to be annexed was neither adjacent or contiguous to the city's boundaries, nor urban in character or suitable for development for urban purposes, as required by that statute. The court concluded that the annexation was a mere subterfuge for allowing the legalization of alcohol sales at the Marina Resort. This appeal followed.

Under the provisions of KRS 81A.420, which govern the type of annexation at issue in this case, standing is conferred upon resident voters or owners of real property in the area to be annexed. The plaintiffs in this case were neither voters nor owners of real property within the limits of the territory proposed to be annexed. Under these circumstances, a taxpayer who lives in the municipality may have standing to challenge the annexation but only "if he shows that he is being personally, substantially and adversely affected by the annexation, and that the damage to himself is different in character from that sustained by the public generally." *Fourroux v. City of Shepherdsville*, 148 S.W.3d 303, 306 (Ky.App. 2004) quoting *King v. City of Corbin*, 535 S.W.2d 85, 86 (Ky. 1976).

The plaintiffs failed to plead such adverse affects and damages in their complaint, which merely described the plaintiffs as "residents and taxpayers of the City

of Burnside, Kentucky.” In a subsequent response to the defendants’ motion to dismiss, the plaintiffs did address the issue of standing, arguing that citizens and taxpayers have an inherent right to contest the illegal acts of their government, which they characterized in this case as an attempt to bypass the local option laws in order to bring liquor to the Marina Resort.

The circuit court found that, at a minimum, two of the plaintiffs, Coggins and Bryant, had standing to bring the lawsuit by virtue of their status as city council members. The court explained its reasoning as follows:

These council members, as plaintiffs, are charged by the voting citizenry to adhere to legal and proper policies in the ongoing governing of the city, and they are statutorily obligated and sworn to promote the interests of that citizenry. Therefore, these Plaintiffs are personally, substantially, and adversely affected by the annexation, and the damage is different in character from that sustained by the public generally. Further, faced with the potential of an annexation that is contrary to law, and therefore void, via a body elected to govern the City of Burnside, by members of the same body, Coggins and Bryant, must not sit idly by without considering their statutory and fiduciary duties to the citizens as a whole. Those statutory and fiduciary duties are not held by the general public, therefore, the breach of these duties is wrought with consequences unique to those having same, including the potential of being removed from office. Their interests are not speculative and are real as required by law.

We disagree with the circuit court’s determination that standing was conferred upon two of the plaintiffs by virtue of their status as council members. Kentucky law requires that in assessing standing, the plaintiffs’ interests and potential damages may not be “remote and speculative but must be a present and substantial

interest in the subject matter.” *City of Louisville v. Stock Yards Bank and Trust Co.*, 843 S.W.2d 327, 328-29 (Ky. 1992) (citations and internal quotation marks omitted). Here, the only consequences that the court found were that the legislators faced potential removal from office, for serving on a legislative body that had enacted an ordinance that might be ruled void. The appellees simply failed to plead or prove a “present and substantial” interest in the subject matter.

Moreover, the conferral of standing on such a basis has significant implications for the doctrine of separation of powers. The standing doctrine serves to keep the judicial branch from unnecessary encroachment into the legislative and executive branches. “Without such limitations - closely related to Art. III concerns but essentially matters of judicial self-governance - the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.” *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 2205 - 2206 45 L.Ed. 2d 343(1975). Our General Assembly has made annexation a legislative function of city governments under KRS 81A.410 *et seq.* Conferring standing upon legislators based on their representative status alone would permit the courts to thwart the legislative will by providing an avenue for disgruntled legislators to circumvent the democratic decision-making process. This reasoning is supported by federal precedent, which forecloses a legislator from asserting standing solely on the basis of his or her position. In *Raines v. Byrd*, 521 U.S. 81, 117

S.Ct. 2312, 138 L.Ed.2d 849 (1997), the Supreme Court of the United States held that Members of Congress did not have standing to challenge the Line Item Veto Act, reasoning that

appellees' [Members of Congress] claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete. . . . [T]he injury claimed by the Members of Congress here is not claimed in any private capacity but solely because they are Members of Congress.

Raines , 521 U.S. at 821, 117 S.Ct. at 2318. Similarly, the injury claimed by the two appellees herein is not claimed in any private capacity but solely in their capacity as council members.

For the foregoing reasons, the order of the Pulaski Circuit Court granting summary judgment to the appellees and denying the motion to dismiss of the appellants is hereby reversed, and remanded for entry of an order dismissing the complaint.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Daniel J. Venters
Somerset, Kentucky

BRIEF FOR APPELLEE:

Jerry J. Cox
Mount Vernon, Kentucky

AMICUS CURIAE BRIEF
FILED ON BEHALF OF
THE KENTUCKY LEAGUE OF CITIES:

R. Temple Juett
James D. Chaney
Lexington, Kentucky