Maynard, J., Dissenting Opinion, Case No.23838 State of West Virginia ex rel. United Mine Workers of America, Local Union 1938, et al. v. Hon. John L. Water and Energy Marketing Company, Inc.

No. 23838 - State of West Virginia ex rel. United Mine Workers of America, Local Union 1938, Dana v. Bender, Clarence D. Dixon, Dennis D. Harris, Paul G. Isner, Donald D. Lloyd, Jerry A. Marco, Mason E. Payne, Larry I. Pigott, Dwight L. Riegel, Jimmie G. Samples, James H. Shiflett, Ronald L. Thorne and Wayne A. Woodall v. Honorable John L. Waters, Judge of the Circuit Court of Barbour County, and Energy Marketing Company, Inc., a West Virginia corporation

Maynard, Justice, dissenting:

This is an original prohibition proceeding--it is not an appeal. Since it is not an appeal, the type of record normally filed with an appeal has not been filed with this Court. The majority, nonetheless, while outwardly acknowledging that the case is a prohibition proceeding, has treated it like an appeal in order to reach the conclusion which it seeks to reach. From that point of view, I feel I must dissent.

This Court has stated that prohibition lies in two situations. The first is where a lower tribunal does not have jurisdiction of the subject matter of the case before it; the second is where a lower tribunal exceeds its legitimate powers in acting with regard to the subject matter. *McDowell County Board of*

Education v. Stephens, 191 W.Va. 711, 447 S.E.2d 912 (1994), *State ex rel. Reed v. Douglas*, 189 W.Va. 56, 427 S.E.2d 751 (1993), and many other cases. In the present case the majority states: "[T]he circuit court did not err in initially determining that it had colorable subject matter jurisdiction to consider issuing a preliminary injunction." The majority, thus, in essence has conceded that prohibition does not lie under the principle that the Court did not have jurisdiction of the subject matter in the case. Further, there is nothing in the case, and the majority points to nothing, which demonstrates that the circuit court exceeded its legitimate powers in issuing the injunction involved in this case.

This Court has also recently recognized that prohibition may be used in a discretionary manner when a lower court is not acting in excess of its jurisdiction, but this use of prohibition is appropriate only to correct substantial clear-cut legal errors that are plainly in contravention of clear statutory constitutional or common law mandate. The disputes involving such errors must be resolvable independently of any disputed facts because prohibition can only be used in this way in cases in which there is a high probability that the trial court's ruling will be completely reversed if error is not corrected in advance. *State ex rel. Amy M. V. Kaufmann*, 196 W.Va. 251, 470 S.E.2d 205 (1996). See also, *Hinkle v. Black,* 164 W.Va. 112, 262 S.E.2d 744 (1979).

In the present case, the relators, called the "petitioners" by the majority, have conceded, and the majority has acknowledged, that Energy Marketing Company, Inc., asserted reasons for not giving prior notice of the fact that it was seeking a preliminary injunction. Nonetheless, the majority says that the reasons were not, in fact, valid. In my view, there was thus a critical disputed fact in this case. That disputed fact was whether Energy Marketing Company, Inc. did or did not have a valid reason for not giving prior notice to the relators. Where there is such a disputed fact, *State ex rel. Amy M. V. Kaufman, id.,* indicates that "discretionary" prohibition does not lie.

My ultimate conclusion is that this Court should have dismissed the relators' petition because they have failed to establish the fundamental predicates for prohibition relief. I am not certain that the majority actually ever seriously or appropriately considered the possibility that prohibition does not lie. The prominent section on standards of review in the majority opinion--which cites appeal standards of review--suggests that at the very least the majority was confused about what was happening in this case. Again I say, this is not an appeal and we are not the "reviewing" Court. We have original jurisdiction in this case.

I have other reasons for dissenting from the majority's decision in this case. The majority predicates its conclusion that the circuit court erred in granting the preliminary injunction on the ground that the circuit court issued the preliminary injunction even though Energy Marketing Company, Inc. gave no notice to the relators that it was seeking a temporary injunction. As previously indicated, and as recognized by the majority, Energy Marketing Company, Inc. did assert a reason for not giving the prior notice. The company asserted that prior to filing its petition, it did not know who the relators' attorney was, and inferentially did not know precisely where to give notice. The majority argues that because the complaint was verified before the filing of the action, and that notice was given to some of the relators on the same day as the filing of the petition, but after the filing was completed, Energy Marketing Company must have known how or where to give the notice prior to the filing of the action. The majority states: "The conclusion is inescapable that Energy Marketing could have given the petitioners the notice to which they were entitled, but chose not to do so." I find this absurd. The majority's view is not at all "inescapable"--a very plausible alternative to that "inescapable" alternative is that Energy Marketing really did not know where to serve the notice prior to the filing of its petition, but did learn where to serve the notice the same day, but after the filing.

Frankly, I am at a loss to understand how we have a default judgment in an injunctive proceeding below, but, going on, the majority proceeds to resolve the default judgment question on the basis of the pre-emption issue. There is a large body of law in this State which indicates that prohibition does not lie to

correct mere errors and should not be used to usurp the function of an appeal, *Handley v. Cook*, 162 W.Va. 629, 252 S.E.2d 147 (1979), *State ex rel. Casey v. Wood* 156 W.Va. 329, 193 S.E.2d 143 (1972), *State ex rel. Zirk v. Muntzing*, 146 W.Va. 878, 122 S.E.2d 850 (1962), *Brown v. Arnold*, 125 W.Va. 824, 26 S.E.2d 238 (1943), *Taylor v. Stevenson*, 82 W.Va. 677, 97 S.E. 136 (1918), and *Buskirk v. Judge of the Circuit Court*, 7 W.Va. 91 (1873). But in this case the majority attempted to do just that.

Everything involved in this case could have been handled by appeal, and if the majority had insisted that an appeal be prosecuted, as our law requires, the outcome might have been very different from the outcome reached by the majority. That outcome, as previously indicated, based its decision on a manifest, "inescapable" determination of fact rather than on what actually occurred.

In my opinion, courts have a very real obligation to protect individuals, organizations, and society as a whole from violence, and to protect them in the exercise of the rights given to them by the law. Often, preliminary injunction questions in labor disputes must be resolved in the heat of violent disorder, in a threatening crisis. In such situations, I feel that the policy needed to protect society outweighs the need of the judiciary to dot every "i" in the pursuit of perfect legal formality. Here, I believe, the majority turned the dotting of "i's," along with the use of that new vehicle, the "INESCAPABLE," to make the factual findings needed to support the conclusion which it wanted to reach. I am personally not a legal contortionist and do not wish to be a party to such twisting of the law, and I dissent from what the majority has done.