IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1998 Term

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No. 24635

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LINDA ADKINS, PAMELA CHAPMAN, DOROTHY ANN GRIMMETT, WEST VIRGINIA EDUCATION ASSOCIATION, UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION, WEST VIRGINIA CITIZEN ACTION GROUP AND WEST VIRGINIA ENVIRONMENTAL COUNCIL,
Appellants

v.

ROBIN CAPEHART, SECRETARY OF THE WEST VIRGINIA DEPARTMENT OF TAX AND REVENUE AND TAX COMMISSIONER, IN HIS OFFICIAL CAPACITY,
Appellee

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Appeal from the Circuit Court of Kanawha County
Honorable A. Andrew MacQueen, Judge
Civil Action No. 96-C-742
CASE DISMISSED

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Submitted: May 6, 1998
Filed: July 2, 1998

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The Opinion of the Court was delivered PER CURIAM.
JUSTICE STARCHER dissents, and reserves the right to file a dissenting opinion.

SYLLABUS

"Under W. Va. Code, 58-5-1 (1925), appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." Syl. Pt. 3, James M.B. v. Carolyn M., 193 W. Va. 289, 456 S.E.2d 16 (1995).

Per Curiam:[1]

Appellants challenge the failure of the Circuit Court of Kanawha County in its order of March 7, 1997, to declare as unconstitutional the method by which the Appellee Secretary of the West Virginia Department of Tax and Revenue (hereinafter referred to as the "Tax Department") currently values coal reserves[2] for purposes of ad valorem taxation. Upon review of this matter, we determine that the order appealed from is not a final order and therefore, this case is dismissed as improvidently granted.

## I. PROCEDURAL HISTORY

[1]We point out that a per curiam opinion is not legal precedent. See Lieving v. Hadley, 188 W. Va. 197, 201 n.4, 423 S.E.2d 600, 604 n.4. (1992).

[2]The current method is prescribed by 110 W. Va. C.S.R. 1I § 4.1.9.2 and involves (a) the review of the data of arms-length sales of coal reserves and of the market conditions within each of five regions and (b) the selection of a single regional value per acre for each region which best typifies the sales within that region.

Appellants initiated the underlying civil action on March 29, 1996, seeking declaratory, injunctive, and mandatory relief in connection with the methodology employed by the Tax Department to value coal reserves for ad valorem property taxation purposes. Citing article X, section 1 of the West Virginia Constitution,[3] Appellants contend that the current system for valuing coal reserves used by the Tax Department does not result in the constitutionally-mandated fair market value.[4]

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[3]Article X, section 1 of the West Virginia Constitution provides, in pertinent part:

> Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value. . . .

[4]Appellants assert that, because a substantial portion of tax revenues collected on coal reserves are used to fund public schools, West Virginia children are being "deprived of the improved facilities, instructional materials and learning environment" that additional tax revenues would provide. Additionally, Appellants contend that the "continued failure to tax reserve coal fairly and equitably undermines crucial public confidence needed to administer a state tax system."

In 1995, a lawsuit[5] which similarly sought an end[6] to the allegedly unconstitutional method used to value coal reserves by the Tax Department was filed by the same interests represented in this case.[7] That case was resolved by agreed order on June 22, 1995, the terms of which required the Tax Commissioner to contract with independent consultants to review the Tax Department's reserve coal tax methodology for the purpose of reaching a determination of whether such property was being assessed at its fair market value. Fulfilling the mandate of such order, the Tax Commissioner

[5] A series of newspaper articles published by the Charleston Gazette-Mail in August 1994 that addressed the issue of unfair taxation of coal reserves apparently sparked the lawsuit. The articles also prompted then Governor Gaston Caperton to direct the Tax Commissioner to correct certain obvious errors contained within the tax data being used for valuation purposes.

[6] In contrast to the current lawsuit which seeks an injunction, a declaratory judgment, and relief in mandamus, the 1995 action only sought a writ of mandamus.

[7] Kermit Lawson, et al. v. James H. Paige, III, Civil Action No. 95-MISC-43 (Kanawha County Circuit Court). The circuit court observed in its March 7, 1997, order in this case that the plaintiffs common to both the Lawson suit and the instant case are the WVEA, the West Virginia Citizens Action Group, the United Mine Workers of America, and the West Virginia Environmental Council.

retained both Resource Technologies Corporation ("RTC")[8] and "Torries and Colyer" as expert tax consultants to evaluate the state's methodology of coal reserve valuation. Both experts reported their findings to the Commissioner in October 1995. RTC reported that

> Current methodology has resulted in the development of a "Comparative Sales Database"' that is not statistically valid by any acceptable measure of confidence. A series of statistical tests performed by both Torries and RTC showed that the average "values" used by the State could not be used to confidently predict the value of the sales within the data base itself. The data base, as it is currently comprised, is not useful.

Torries and Colyer concluded in their report that "[c]urrently the methodology results in predicted values that differ from actual values on an average of plus or minus 50 percent, but can range up to 600 percent from the actual values."

With regard to the present litigation, the circuit court, in its March 7, 1997, order, observed:

[8]RTC was the plaintiffs' expert in the 1995 Lawson case. The Tax Department engaged RTC as a consultant and permitted it to become an integral part of the efforts to implement the 1995 agreed order in the Lawson case.

> it appears to be undisputed that the defendant has complied with all of the requirements of the earlier consent decree [Lawson case] and that he continues on a schedule, with his consultants, the object of which is to value coal reserve lands more accurately (and in a manner that more closely comports with Constitutional and statutory requirements).

The lower court further opined:

> The plaintiffs have offered no evidence that the defendant is acting in bad faith with respect to his promise to attempt to improve the method he uses to value coal reserves. They have not attempted to demonstrate that he has been dragging his feet or obstructing the process. Instead, they have continued to articulate, in great detail, the same deficiencies that were identified in the earlier mandamus action. The plaintiffs appear to want the Court to order the defendant to immediately implement a fairer, more constitutional method for valuing coal reserve property but, at no time have they suggested any alternative method which could be immediately implemented.

A new methodology for appraising the value of coal reserves was identified by consultants RTC and Torries in their joint report dated June 1, 1997.[9] Based on this new methodology, the Tax Department filed with the

[9]Whereas the current method for valuing coal reserves involves a mass estimate of the value of the individual tax parcels throughout five separate

Secretary of State's office the Tax Department's "Proposed Legislative Rules, Title 110, Series 1I, Valuation of Active and Reserve Coal Property for Ad Valorem Property Tax Purposes" on June 25, 1997. The proposed rules were submitted to the circuit court along with the Consultant's report.

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regions of the state, the proposed method employs 1,376,160 regions (235 districts X 61 seams X 4 seam characteristics X 6 mining factors X royalty and price factors X BTU and Sulfur factors). The consultants' 6/1/97 report states that the "proposed model, by considering as many distinguishing factors as possible, significantly lessons the equity issue."

Appellants made clear on oral argument and through their briefs that their primary remedial concern is the circuit court's failure in its March 7, 1997, order to issue a declaratory judgment finding the Tax Department's current methodology for valuing coal reserves for ad valorem property taxation purposes to be unconstitutional.[10] Based on the jurisdictional challenge raised to our consideration of this matter,[11] we must first determine whether this case is properly before us.

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[10]The Tax Department observed that the circuit court's hesitation to make such a finding, especially in view of the substantial costs expended and extensive efforts undertaken by the Department to seek an improved way of valuing coal reserves, was premised on the lower court's unwillingness to leave this state with no replacement mechanism for valuing this state's coal reserves. The circuit court expressed its concern that a complete cessation of coal reserve tax revenue would result until such time as an alternate method could be proposed, adopted, and implemented. Since, as a general rule, a declaration of a law's unconstitutionality renders the law void, a declaration of a taxing mechanism as unconstitutional would prevent taxes from being collected pursuant to the unconstitutional mechanism. See State ex rel. City of Charleston v. Bosely, 165 W. Va. 332, 344-45, 268 S.E.2d 590, 598 (1980).

[11]This issue was first raised by the Tax Department in a motion to dismiss Appellants' petition for appeal. This Court denied the motion to dismiss on the basis of lack of jurisdiction but did so "without prejudice with leave to raise the issue in oral argument."

## II. RULE OF FINALITY

The Tax Department argues that by its very language the March 7, 1997, order appealed from does not qualify as a final order[12] and therefore, this Court is without jurisdiction over this matter. The order appealed from states:

> it is therefore ORDERED that this action shall be retained on the active docket of this court for the purpose of monitoring the progress of the West Virginia Department of Tax and Revenue toward the development of an alternative method of valuing coal reserve land within this State. It is further ORDERED that the defendant shall file with this court and serve on opposing counsel any interim reports and any recommendations of the consultants, Resource Technologies Corporation and Torries and Associates as well as any proposed changes to the rules or regulations of the Department which relate to the valuation of coal reserve land.
>
> It is further ORDERED that either party may request a hearing before the court for any purpose related to the issues involved, including, but not limited to a request to modify the terms of this order or to dismiss this action.

[12]As we noted in Durm v. Heck's, Inc., 184 W. Va. 562, 401 S.E.2d 908, "[a] statutory right to appeal arises in a civil case following the entry of a 'final judgment, decree or order.'" Id. at 566, 401 S.E.2d at 912, n.3 (quoting W. Va. Code § 58-5-1(a) (1966)).

Appellate jurisdiction, as we explained in syllabus point three of James M.B. v. Carolyn M., 193 W. Va. 289, 456 S.E.2d 16 (1995), is controlled by the rule of finality:

> Under W. Va. Code, 58-5-1 (1925), appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.

While certain exceptions to this rule of finality[13] exist, such as matters involving prohibition, certified questions, a Rule 54(b) judgment order,[14] or the "collateral order" doctrine,[15] we find none of those exceptions to exist in the instant case.

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[13]See James M.B., 193 W. Va. at 292, 456 S.E.2d at 19 (stating that "the 'rule of finality,' is designed to prohibit 'piecemeal appellate review of trial court decisions which do not terminate the litigation[.]'") (quoting United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1982)).

[14]See James M.B., 193 W. Va. at 292, 456 S.E.2d at 19 n.3.

[15]To come within the narrow exception of the "collateral order" doctrine, the order appealed from must (1) be conclusive; (2) resolve significant issues separate from the merits; and (3) render those significant issues "'effectively unreviewable on appeal from final judgment on the underlying action.'" Coleman v. Sopher, 190 W. Va. 90, 96, 459 S.E.2d 367,

373 n.7 (1995) (citing Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994)).

Appellants take the position that the March 7, 1997, order leaves nothing to be resolved and therefore qualifies as a final order. We cannot reach the same conclusion as the circuit court's order clearly contemplates additional review, if only in the nature of monitoring the progress of proposed methodology changes,[16] and further provides for continuing jurisdiction over the matter for "any purpose related to the issues involved, including" requests for modification or dismissal. As such, we determine that this Court does not have jurisdiction over this matter under well-established principles that require the issuance of a final order as a prerequisite to appellate review.[17] See James M.B., 193 W. Va. at 291,

[16]The Tax Department points out that it has twice supplemented the lower court's record in this case by submitting information in the nature of interim reports and proposed rule changes as required by the March 7, 1997, order.

[17]In addition, we note another jurisdictional impediment to Appellants' request for a declaratory judgment ruling. As this Court held in Trail v. Hawley, 163 W. Va. 626, 259 S.E.2d 423 (1979), "for the purposes of a declaratory judgment action, a justiciable controversy exists when a legal right is claimed by one party and denied by another." Id. at 628, 259 S.E.2d at 425. Since Appellants contend that the Tax Department has finally acknowledged, albeit implicitly, that its current methodology does not result in the constitutionally-mandated fair market valuation, there is arguably no longer a legal right claimed by one side that is being denied

456 S.E.2d at 18, syl. pt. 3; accord Coleman v. Sopher, 194 W. Va. 90, 94, 459 S.E.2d 367, 371 (1995); Parkway Fuel Serv., Inc. v. Pauley, 159 W.Va. 216, 219, 220 S.E.2d 439, 441 (1975).

Having concluded that Appellants' petition for appeal was not properly before this Court due to the absence of an appealable final order, we hereby dismiss this case as improvidently granted.

Case dismissed.

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