No. 31538 - State ex rel. Abraham Linc Corporation v. Honorable Thomas Bedell,

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring:

In this proceeding the majority opinion has issued a writ of prohibition that prevents the circuit court from allowing John Edens (hereinafter referred to as "Mr. Edens") from pursuing a common law cause of action against Abraham Linc Corporation (hereinafter referred to as "Abraham Linc"). I concur in the decision to issue the writ. However, as illustrated below, I believe the writ should have issued for another reason.

A. Raising the Issue of Standing Sua Sponte

Mr. Edens sought to litigate a common law negligence action against his employer, Abraham Linc, on the theory that Abraham Linc's workers' compensation account was in default because it failed to pay premiums on behalf of another employee, Don Johnson (hereinafter referred to as "Mr. Johnson"). Neither party raised below, or in this proceeding, the issue of whether or not Mr. Edens had standing to litigate the employment status of Mr. Johnson. We have previously noted that "'[s]tanding is an element of jurisdiction over the subject matter.'" *State ex rel. Paul B. v. Hill*, 201 W. Va. 248, 256, 496 S.E.2d 198, 206 (1997) (quoting 21A Michie's Jurisprudence Words & Phrases 380 (1987). Further, "[s]tanding is a jurisdictional requirement that cannot be waived, and may be

brought up at any time in a proceeding." Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b), p. 21 (Supp. 2004). The decisions of this Court and other jurisdictions have pointed out that an appellate court has the inherent authority and duty to *sua sponte* address the issue of standing, even when the parties have failed to raise the issue at the trial court level or during a proceeding before the appellate court. *See State ex rel. Youngblood v. Sanders*, 212 W. Va. 885, 894, 575 S.E.2d 864, 575 (2002) (Davis, J., concurring) ("[T]his Court ha[s] the authority and the duty to address the issue of standing . . . *sua sponte*."); Syl. pt. 2, in part, *James M.B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995) ("Where neither party to an appeal raises, briefs, or argues a jurisdictional question presented, this Court has the inherent power and duty to determine unilaterally its authority to hear a particular case. Parties cannot confer jurisdiction on this Court directly or indirectly where it is otherwise lacking.").[1] It is my opinion that this Court should have *sua sponte* invoked the issue of

[1]*See also FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231, 110 S. Ct. 596, 607, 107 L. Ed.2d 603 (1990) ("Neither the District Court nor the Court of Appeals determined whether petitioners had standing to challenge any particular provision of the ordinance. Although neither side raises the issue here, we are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us."); *Delorme v. United States*, 354 F.3d 810, 815 (8th Cir. 2004) ("[Appellant] claims that the issue of standing is not before this court because the district court did not dismiss on that basis. As a jurisdictional requirement, however, standing can be raised by the court *sua sponte* at any time during the litigation."); *Pandrol USA, LP v. Airboss Ry. Prods., Inc.*, 320 F.3d 1354, 1367 (Fed. Cir. 2003) ("It is well-established that any party, and even the court *sua sponte*, can raise the issue of standing for the first time at any stage of the litigation[.]"); *Rector v. City & County of Denver*, 348 F.3d 935, 942 (10th Cir. 2003) ("Standing . . . raises jurisdictional questions and we are required to consider the issue *sua sponte*[.]"); *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 331-332 (5th Cir. 2002) (Although

standing, and resolved this case on that issue.

B. General Standing Principles

This Court has indicated that "[g]enerally, standing is defined as '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002) (quoting Black's Law Dictionary 1413 (7th ed. 1999)). Ultimately, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975). *See also Flast v. Cohen*, 392 U.S. 83, 99-100, 88 S. Ct. 1942, 1952, 20 L. Ed. 2d 947 (1968) ("In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue[.]"). Furthermore, "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." *International Primate Protection League v.*

. . . standing was not raised by the parties or considered by the district court, we must -- where necessary -- raise it *sua sponte*."); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1056 (9th Cir. 2002) ("We also hold that appellants do not have standing to seek declaratory relief. We raise this standing issue *sua sponte*, as the law requires."); *Chong v. District Director, I.N.S.*, 264 F.3d 378, 383 (3rd Cir. 2001) ("[C]ourts must decide . . . standing issues, even when not raised by the parties, before turning to the merits."); *S.E.C. v. Basic Energy & Affiliated Resources, Inc*., 273 F.3d 657, 665 (6th Cir. 2001) ("The litigants in the present case have not raised the issue of the movants' standing to appeal the orders of the district court, but we raise this issue, *sua sponte*, because we are under an independent obligation to police our own jurisdiction."); *Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271, 1275 (11th Cir. 2000) ("We are obliged to consider standing *sua sponte* even if the parties have not raised the issue.").

Administrators of Tulane Educ. Fund, 500 U.S. 72, 77, 111 S. Ct. 1700, 1704, 114 L. Ed.2d 134 (1991).

The decisions of this Court have recognized two types of standing inquiries. First, the issue of standing may be presented in the context of a litigant asserting an alleged right that is unique to him or her. This is known "as first party standing[.]" *Romano v. Harrington*, 664 F. Supp. 675, 679 (E.D.N.Y. 1987). In this specific context, we articulated the elements for establishing standing in syllabus point 5 of *Findley* as follows:

> Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an "injury-in-fact" -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

213 W. Va. 80, 576 S.E.2d 807.[2]

The second context in which standing may be analyzed occurs when a litigant seeks to assert the rights of a third party. This standing issue "is also commonly known as

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[2]The requirements for first party standing are "constitutional requirements[.]" *Granite State Outdoor Advertising, Inc. v. City of Clearwater, Fla.*, 351 F.3d 1112, 1116 (11th Cir. 2003). Justice Cleckley stated in *Coleman v. Sopher*, "Section[s] 3 [and 6] of Article VIII of the West Virginia Constitution refer[] to the word 'controversy[.]' One of the incidents of [the] controversy requirement is that a litigant have 'standing[.]'" 194 W. Va. 90, 95 n.6, 459 S.E.2d 367, 373 n.6 (1995).

jus tertii standing." *Pennsylvania Psych. Soc. v. Green Spring Health Servs., Inc*., 280 F.3d 278, 287 n.7 (3rd Cir. 2002). In this situation "[i]t is a well-established rule that a litigant may assert only his own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties."[3] *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002). We have previously noted that

> [t]raditionally, courts have been reluctant to allow persons to claim standing to vindicate the rights of a third party on the grounds that third parties are generally the most effective advocates of their own rights and that such litigation will result in an unnecessary adjudication of rights which the holder either does not wish to assert or will be able to enjoy regardless of the outcome of the case.

Snyder v. Callaghan, 168 W. Va. 265, 279, 284 S.E.2d 241, 250 (1981) (citation omitted). *See also State ex rel. Leung v. Sanders*, 213 W. Va. 569, 578, 584 S.E.2d 203, 212 (2003)

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[3]The rule that prohibits a party from litigating the rights of another is a prudential standing rule that is not constitutionally based. *See American Fed'n of Gov't Employees, AFL-CIO v. Rumsfeld*, 321 F.3d 139, 142 (D.C.Cir. 2003) ("Prudential standing, unlike Article III standing, is based not on the Constitution, but instead on prudent judicial administration." (internal quotation marks and citation omitted)). There are three generally recognized prudential standing rules: "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984). Further, it has been appropriately noted that "'[p]rudential standing limitations help courts identify proper questions of judicial adjudication, and further define the judiciary's role in the separation of powers.'" *McClure v. Ashcroft*, 335 F.3d 404, 411 (5th Cir. 2003) (quoting *Ruiz v. Estelle*, 161 F.3d 814, 829 n. 22 (5th Cir.1998)). However, "[p]rudential standing concerns, unlike constitutional ones, can be abrogated by an act of [the legislature]." *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 68 (1st Cir. 2003). That is, the legislature "may grant an express right of action to persons who otherwise would be barred by prudential standing rules." *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206, 45 L. Ed. 2d 343 (1975).

(per curiam) ("In light of our clear and long-standing precedent against third-party standing, the circuit court committed clear legal error in permitting Ms. Schell to litigate Dr. Wanger's and Shenandoah's potential rights." (footnote omitted)); *Board of Educ. of County of Taylor v. Board of Educ. of County of Marion*, 213 W. Va. 182, 189, 578 S.E.2d 376, 383 (2003) ("To the extent that the transfer request form used by the Marion County Board contains a similar clause, the Taylor County Board is simply without standing to seek its enforcement."); *Kessel v. Leavitt*, 204 W. Va. 95, 117, 511 S.E.2d 720, 742 (1998) ("[W]e discern [no] authority to permit a defendant [standing] to challenge the personal jurisdiction of a codefendant when that codefendant, by his/her acts or omissions, has waived his/her right to challenge such personal jurisdiction."); *Guido v. Guido*, 202 W. Va. 198, 203, 503 S.E.2d 511, 516 (1998) (per curiam) ("In the instant matter it is quite clear that Mr. Guido lacks standing to bring any appeal issues which directly involve his parents. He has no justiciable interest in the claims of his parents."); *West Virginia AAA Statewide Ass'n v. Public Serv. Comm'n of West Virginia*, 186 W. Va. 287, 288 n.3, 412 S.E.2d 481, 482 n.3 (1991) ("Because appellant is not an entity who is subject to the tariffs at issue, AAA does not have standing to raise procedural issues pertaining to a PSC-administered rate increase.").

While this Court has recognized exceptions to the general rule that a litigant may not assert the rights of a third party, we have never articulated a general *jus tertii* standing test for determining whether a litigant may assert the rights of a third party. *See*,

e.g., Local Div. No. 812 of Clarksburg, W. Va., of Amalgamated Transit Union v. Central West Virginia Transit Auth., 179 W. Va. 31, 34 n.2, 365 S.E.2d 76, 79 n.2 (1987) ("[L]abor organization may sue or be sued as an entity and in behalf of the employees whom it represents."); Syl. pt. 2, *Snyder v. Callaghan*, 168 W. Va. 265, 284 S.E.2d 241 (1981) ("An association which has suffered no injury itself, but whose members have been injured as a result of the challenged action, may have standing to sue solely as the representative of its members when: (1) its members would have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."); Syl. pt. 2, *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979) ("For standing under the Declaratory Judgments Act, it is not essential that a party have a personal legal right or interest."); *Tug Valley Recovery Ctr., Inc. v. Mingo County Comm'n*, 164 W. Va. 94, 103, 261 S.E.2d 165, 170-171 (1979) (holding that any interested resident or taxpayer has standing to contest assessment of land not belonging to him or her). Because of the facts presented in the instant case, I believe the Court was obligated to set out a general test for determining when a litigant may assert the rights of a third party.

C. Jus Tertii Standing Principles

Federal courts have adopted a three pronged *jus tertii* standing test to determine whether a litigant may assert the rights of a third party. In *Powers v. Ohio*, the United States Supreme Court succinctly set out the three pronged test that was developed in its prior

decisions: "[t]he litigant must have suffered an injury in fact . . .; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." 499 U.S. 400, 411, 111 S. Ct. 1364, 1370-71, 113 L. Ed. 2d 411 (1991) (internal quotations and citations omitted). *See also Lepelletier v. F.D.I.C.*, 164 F.3d 37, 43 (D.C. Cir. 1999) (applying test in civil case); *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 404 (6th Cir. 1999) (applying test in civil case); *Wauchope v. United States Dep't of State*, 985 F.2d 1407, 1411 (9th Cir. 1993) (applying test in civil case); *Freilich v. Board of Directors of Upper Chesapeake Health, Inc.*, 142 F. Supp. 2d 679, 699 (D. Md. 2001) (applying test in civil case); *Moreno v. G & M Oil Co.*, 88 F. Supp. 2d 1116, 1118 (C.D. Cal. 2001) (applying test in civil case); *Clark v. State*, 585 So. 2d 249, 250 (Ala. Crim. App. 1991) (applying test in criminal case); *People v. Morris*, 131 Cal. Rptr. 2d 872, 879 (2003) (applying test in criminal case); *Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002) (applying test in civil case); *State v. Velez*, 588 So. 2d 116, 125 (La. Ct. App. 1992) (applying test in criminal case); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 847 (N.M. 1998) (applying test in civil case); *New York County Lawyers' Ass'n v. Pataki*, 727 N.Y.S.2d 851, 856 (2001) (applying test in civil case); *State v. Orwick*, 791 N.E.2d 463, 466 (Ohio Ct. App. 2003) (applying test in criminal case); *Gray's Disposal Co., Inc. v. Metropolitan Gov't of Nashville*, 122 S.W.3d 148, 158 (Tenn. Ct. App. 2003) (applying test in civil case); *Salazar v. State*, 818 S.W.2d 405, 408 (Tex. Crim. App. 1991) (applying test in criminal case).

Under the first prong of the *Powers* test, "it is only possible to find third party standing when there is also an injury in fact alleged by the first party plaintiff." *Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 299 (3rd Cir. 2003). Thus, a party must show that he or she "suffered a concrete injury[.]" *Wauchope v. United States Dep't of State*, 985 F.2d 1407, 1411 (9th Cir. 1993). To satisfy the second prong of *Powers* a litigant must show that "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, . . . [or] the relationship between the litigant and the third party [is] such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton v. Wulff*, 428 U.S. 106, 114-15, 96 S. Ct. 2868, 2874, 49 L. Ed. 2d 826 (1976). Under the third prong of *Powers*, it must be shown that "there is some genuine obstacle to [the third party's] assertion [of his rights.]" *Singleton*, 428 U.S. at 116, 96 S. Ct. at 2875.

I believe that the *Powers* factors are sound for assessing whether a litigant may assert the rights of a third party. Therefore, I believe the following principle of law should have been adopted in this case: The *jus tertii* standing requirements that must be established by a litigant seeking to assert the rights of a third party are: (1) the litigant must have suffered an injury-in-fact; (2) the litigant must have a close relation to the third party; and (3) there must exist some hindrance to the third party's ability to protect his/her own interests.

D. Applying Jus Tertii Standing Principles to Mr. Edens' Attempt to Litigate the Rights of a Third Party

Mr. Edens sought to litigate a common law negligence claim against Abraham Linc, under the theory that Abraham Linc was in default with the Workers' Compensation Commission at the time of his injury. The record is clear that the sole basis upon which Mr. Edens relies, in order to show that Abraham Linc was in default, involves the employment status of Mr. Johnson. Indeed, the circuit court expressly found that "an issue of material fact exists as to whether Don Johnson . . . was an 'employee' or 'independent contractor.'" I believe that the employment status of Mr. Johnson is an issue that *Mr. Johnson* may have standing to litigate, if he is injured while working for Abraham Linc.[4] *See Shifflett v. McLaughlin*, 185 W. Va. 395, 407 S.E.2d 399 (1991) (per curiam) (where the estate of the decedent, who had been a part-time employee, was allowed to maintain a common law

[4]I will also note that, in addition to attempting to litigate Mr. Johnson's rights, Mr. Edens is also attempting to litigate rights of the Workers' Compensation Commission. That is, to the extent that Abraham Linc should have categorized Mr. Johnson as an employee and paid workers' compensation premiums accordingly, the Workers' Compensation Commission was injured and is statutorily empowered to seek redress. *See* W. Va. Code § 23-1-19(a) (2003) (Spec. Supp. 2003) ("Any . . . corporation . . . which willfully, by means of false statement or representation, or by concealment of any material fact, . . . obtains . . . reduced premium costs . . . shall be liable to the workers' compensation commission in an amount equal to three times the amount of such benefits, payments or allowances to which he or it is not entitled[.]"); W. Va. Code § 23-2-5a(a) (2003) (Spec. Supp. 2003) ("The workers' compensation commission . . . may commence a civil action against an employer who, after due notice, defaults in any payment required by this chapter."). Obviously, I am concerned about the possibility that the rights of Mr. Johnson and the Workers' Compensation Commission may be in jeopardy. However, "'[b]ecause the judiciary's primary role . . . is to adjudicate the rights of the private parties before it, the mere fact that the . . . rights of third parties may be in jeopardy provides no justification for judicial intervention.'" *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1099 (9th Cir. 2000) (quoting Note, "Standing to Assert Constitutional Jus Tertii," 88 Harv. L. Rev. 423, 429 (1974)).

negligence action against the employer because the employer failed to pay workers' compensation premiums specifically on behalf of the decedent).[5] Insofar as Mr. Edens seeks to litigate rights that Mr. Johnson may have, i.e., the right to be categorized as an employee and the right to enjoy workers' compensation benefits flowing therefrom, I believe Mr. Edens must satisfy *jus tertii* standing requirements.[6]

Applying the *jus tertii* standing requirements to the facts of this case, I need go no further than the first requirement. In order for Mr. Edens to litigate the employment status of Mr. Johnson, he must establish an injury-in-fact that flows from Mr. Johnson's employment status as an independent contractor. This he cannot do.

In this proceeding there are no allegations that Abraham Linc failed to inform

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[5]*See also Erie Ins. Property and Cas. Co. v. Stage Show Pizza, JTS, Inc.*, 210 W. Va. 63, 553 S.E.2d 257 (2001) (noting that employer was in default of its obligations to the workers' compensation fund for failure to pay premiums on the date the plaintiff was injured.); *State ex rel. Frazier v. Hrko*, 203 W. Va. 652, 510 S.E.2d 486 (1998) (where injured employee was allowed to maintain common law negligence action against employers after Workers' Compensation Commission issued orders declaring employers were in default on the date employee was injured); *Kosegi v. Pugliese*, 185 W. Va. 384, 407 S.E.2d 388 (1991) (estate of the decedent allowed to maintain a common law negligence action against the employer, because the employer failed to pay *any* workers' compensation premiums during the period decedent was killed).

[6]I have carefully examined the workers' compensation statutes. I have found no statutory provision giving an employee the right to litigate the employment status of another worker for the purpose of proving an employer was in default for failing to make premium payments on behalf of the other worker.

the Workers' Compensation Commission that Mr. Edens was an employee. There is no dispute that after Mr. Edens was injured he obtained workers' compensation benefits. Mr. Edens was covered by Abraham Linc's compliance with the reporting and premium payment requirements of the Workers' Compensation Commission.[7] Consequently, the fact that Abraham Linc listed Mr. Johnson as an independent contractor and paid no workers' compensation premiums on his behalf did not cause an injury-in-fact to Mr. Edens. "Absent specific facts establishing distinct and palpable injuries fairly traceable to [Mr. Johnson's employment status], [Mr. Edens] cannot satisfy [his] burden at the summary judgment stage to establish the injury in fact requirement for [jus tertii] standing[.]" *Arkansas ACORN Fair Housing, Inc. v. Greystone Dev., Ltd. Co.*, 160 F.3d 433, 435 (8th Cir. 1998). Thus, Mr. Edens does not have *jus tertii* standing on the dispositive issue that would permit a common law negligence action to proceed against Abraham Linc. Under these circumstances, Abraham Linc is entitled to the writ. *See Burke v. City of Charleston*, 139 F.3d 401, 405 n.2 (4th Cir. 1998) ("[J]us tertii plaintiff is obligated as an initial matter to [establish] a distinct and palpable injury[.]").

[7]We are aware that workers' compensation benefits cannot be denied merely because an employer failed to make required premium payments. *See* W. Va. Code § 23-2-5(g) (2003) (Spec. Supp. 2003) ("[N]o employee of an employer required by this chapter to subscribe to the workers' compensation fund shall be denied benefits provided by this chapter because the employer failed to subscribe or because the employer's account is either delinquent or in default."). However, in this case there is no dispute that premium payments were made that reflected Mr. Edens' status as an employee.

In view of the foregoing, I concur.