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C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 24-373 – *Alexander Fleming, Carole Carter, Carol Gallant, Barbara Humes, and Benjamin Buckley v. Matt Herridge, Secretary of the West Virginia Department of Commerce, and Todd Hooker, Acting Executive Director of the West Virginia Division of Economic Development*

BUNN, Chief Justice, dissenting:

I dissent to the majority's resolution of this case because of the unaddressed issue of the Petitioners' standing. The West Virginia Intermediate Court of Appeals (ICA) raised this concern in footnote six of its opinion on appeal to this Court. *Fleming v. Carmichael*, 250 W. Va. 67, 72 n.6, 902 S.E.2d 199, 204 n.6 (Ct. App. 2024). Still, even with the specter of jurisdictional standing in the ICA's footnote, neither party addressed the issue in its briefing to this Court. The majority opinion leapfrogs over this necessary inquiry, proceeding directly to address the substantive issues on appeal. I would have remanded this case back to the circuit court for further findings of fact about the Petitioners' standing and the court's resulting jurisdiction, or, at the very least, ordered the parties to submit additional briefing regarding the issue.

Circuit courts have subject matter jurisdiction where a "justiciable case or controversy" exists, as required by Article VIII, Section 6 of the West Virginia Constitution. *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 242, 800 S.E.2d 506, 509 (2017).[1] This jurisdiction requires that "the party asserting a legal right" has "standing to

[1] "Article VIII, Section 6 of the West Virginia Constitution establishes that there must be a justiciable case or controversy—a legal right claimed by one party and denied

assert that right." *Id*. As the ICA noted, this Court has recognized the three elements of standing:

> 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.

Syl. Pt. 2, *id.* (quoting Syl. Pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002)); *Fleming*, 250 W. Va. at 72 n.6, 902 S.E.2d at 204 n.6 (quoting same). In the footnote, the ICA "recognized the threshold issue of standing" and questioned whether the Petitioners, the underlying plaintiffs, had a "particularized" injury, but resolved that "given that a particular set of facts *may* exist to provide Petitioners standing in this matter and the Respondents have not raised such issue on appeal; we do not address it here." *Fleming*, 250 W. Va. at 72 n.6, 902 S.E.2d at 204 n.6 (emphasis added). The ICA, although it alluded to particular facts, did not explain further.

Standing cannot be waived. *Pavone v. NPML Mortg. Acquisitions, LLC*, 246 W. Va. 418, 421, 874 S.E.2d 21, 24 (2022). Rather, we have a duty and the authority to address standing sua sponte: "Where neither party to an appeal raises, briefs, or argues a jurisdictional question presented, this Court has the inherent power and duty to determine

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by another—in order for the circuit court to have subject matter jurisdiction." *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 242, 800 S.E.2d 506, 509 (2017).

unilaterally its authority to hear a particular case. Parties cannot confer jurisdiction on this Court directly or indirectly where it is otherwise lacking." Syl. Pt. 1, *id.* (quoting Syl. Pt. 2, *James M.B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995)). In assessing whether the parties have standing, the question is "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Syl. Pt. 4, in part, *Manville Pers. Inj. Settlement Tr. v. Blankenship*, 231 W. Va. 637, 749 S.E.2d 329 (2013) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975) and *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002)).

Here, the parties seek a resolution to their dispute and, by avoiding the issue, essentially urge the Court to look past any question of standing. Still, we have long recognized that "[c]ourts are not constituted for the purpose of making advisory decrees or resolving academic disputes. The pleadings and evidence must present a claim of legal right asserted by one party and denied by the other before jurisdiction of a suit may be taken." Syl. Pt. 1, *State ex rel. Perdue v. McCuskey*, 242 W. Va. 474, 836 S.E.2d 441 (2019) (quoting *Mainella v. Board of Trs. of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W. Va. 183, 185-86, 27 S.E.2d 486, 487-88 (1943) and Syl. Pt. 2, *Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991)). A remand of this case to the circuit court would have allowed the parties the opportunity to develop facts that potentially would give rise to a particularized injury on the part of the plaintiffs sufficient to confer standing. The Court should not address the merits of this appeal without fully analyzing the question as to whether the Petitioners have a particularized injury and

therefore standing, without which neither this Court nor the lower courts have jurisdiction. Therefore, I respectfully dissent.