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# ALABAMA COURT OF CIVIL APPEALS

**OCTOBER TERM, 2015-2016**

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**2140963 and 2140964**

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**Judge John E. Enslen, in his official capacity as the Probate Judge of Elmore County**

**v.**

**Alabama Department of Transportation**

**Appeals from Elmore Circuit Court**
**(CV-15-64 and CV-15-65)**

MOORE, Judge.

In appeal no. 2140963, Judge John E. Enslen, in his official capacity as the probate judge of Elmore County, appeals from a judgment entered by the Elmore Circuit Court

("the circuit court"), in circuit-court case no. CV-15-64, granting a petition for a writ of mandamus filed by the Alabama Department of Transportation ("the DOT") against Mercer Properties, Inc., and directing Judge Enslen to vacate his order conditionally dismissing a condemnation action that had been instituted in the probate court by the DOT against Mercer Properties. In appeal no. 2140964, Judge Enslen, in his official capacity as the probate judge of Elmore County, appeals from a judgment entered by the circuit court, in circuit-court case no. CV-15-65, granting a petition for a writ of mandamus filed by the DOT against Willow Bend Properties, Inc., and directing Judge Enslen to vacate his order conditionally dismissing a condemnation action that had been instituted in the probate court by the DOT against Willow Bend Properties. We dismiss the appeals.

Procedural History

On March 10, 2015, the DOT filed in the probate court an "Amended Petition to Condemn Real Property and for an Order of Condemnation" regarding certain real property located in Elmore County owned by Mercer Properties ("the Mercer Properties action"). That same day, the DOT filed an "Amended

Petition to Condemn Real Property and for an Order of Condemnation" regarding certain real property located in Elmore County owned by Willow Bend Properties ("the Willow Bend Properties action"). The probate court entered separate orders granting the amended petitions that same day, and, on March 31, 2015, the probate court "appointed Commissioners to assess the damages and compensation to which [the owners of the property were] entitled" in both cases.

Although it is not clear from the record whether the cases were consolidated before the probate court, the record does not contain a transcript of any hearing that took place in the probate court in either the Mercer Properties action or the Willow Bend Properties action. It is apparent from the record, however, as well as the parties' briefs to this court, that the sole evidence presented by the DOT in the probate court regarding the value of the property owned by Mercer Properties and the value of the property owned by Willow Bend Properties were letters that the DOT had sent to Mercer Properties and to Willow Bend Properties, respectively, both of which "summarized the appraisal and how much the value of the property was worth." Both Mercer Properties and Willow

Bend Properties moved the probate court to dismiss the cases based on the DOT's failure to present sufficient evidence of the value of the subject properties. On April 28, 2015, the probate court entered separate, but almost identical, orders in the Mercer Properties action and the Willow Bend Properties action in which it stated:

> "Now before the Court is Defendant's oral motion at the close of [the DOT's] case to dismiss due to [the DOT's] failure to offer any admissible, legal evidence to the Commissioners on the fair market value of the subject property before or after the taking, and [the DOT's] refusal to accept the Court's offer to continue the case to a later date and re-open [the DOT's] case so such evidence could be admitted, and after due consideration the Court hereby FINDS, ADJUDGES and DECREES as follows:
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> "The Court finds that no legal, admissible evidence of the only accepted valuation methodology, the 'before and after' methodology, was offered by [the DOT]. See Cullman v. Moyer, 594 So. 2d 70 (Ala. 1992); Chandler v. State, 910 So. 2d 108 (Ala. Civ. App. 2004); Ala. Code [1975,] § 18-1A-170. [The DOT's] failure was intentional. [The DOT's] failure, and refusal, to offer legal evidence to the Commissioners denies Defendant[] the due process and procedural protections guaranteed [it] by the Constitution and by the Alabama Eminent Domain Code. This is, at best, a failure to prosecute or it is an abuse of condemnation process.
>
> "Therefore, it is hereby Ordered that this action is conditionally dismissed unless [the DOT], in the next 30 days, request[s] a new trial date at which [it] intend[s] to offer legal, admissible evidence, in which case this action will be

> reinstated and re-set for a trial. If [the DOT] continue[s] to refuse to offer legal, admissible evidence, then this Court will hold another hearing concerning the award of litigation expenses for the Defendant[] and sanctions against [the DOT]."

(Capitalization in original.)

On April 29, 2015, the DOT filed a response to the motions to dismiss that had been filed in both the Mercer Properties action and the Willow Bend Properties action. On May 6, 2015, the DOT filed motions in both actions asking the probate court to reconsider its judgments; the DOT incorporated into those motions the responses it had filed to the motions to dismiss. On May 14, 2015, the DOT filed, in both actions, supplements to its motions to reconsider. On May 15, 2015, the probate court denied the motions to reconsider filed in both the Mercer Properties action and the Willow Bend Properties action.

On June 12, 2015, the DOT filed a petition in the circuit court, requesting the circuit court to issue "a writ of mandamus directing the Probate Court to vacate and reverse its May 15, 2015 order [in the Mercer Properties action] and to appoint new commissioners to conduct a commissioners hearing in accordance with Ala. Code [1975,] § 18-1A-281"; that

petition was assigned case no. CV-15-64. That same day, the DOT filed a separate petition in the circuit court seeking the same relief regarding the Willow Bend Properties action; that petition was assigned case no. CV-15-65. On July 21, 2015, Mercer Properties and Willow Bend Properties filed answers to the petitions. On July 22, 2015, the DOT filed amended petitions for a writ of mandamus.

On July 29, 2015, the circuit court entered a judgment in the Mercer Properties action granting the DOT's petition for a writ of mandamus; on August 4, 2015, the circuit court entered a judgment in the Willow Bend Properties action granting DOT's petition. In both the Mercer Properties action and the Willow Bend Properties action, the circuit court directed Judge Enslen to vacate the probate court's orders of conditional dismissal, finding that "the Offer letter and other evidence submitted by [the DOT] and admitted by the Probate Court complied with Ala. Code [1975,] § 18-1A-281," and "that no additional evidence or testimony was required to be submitted at the commissioners hearing under the Alabama Eminent Domain Code"; the circuit court ordered that a new hearing be held and instructed the probate court that "any

party in interest ... may in accordance with ... § 18-1A-281 offer any legal evidence but no party will be required to present expert testimony or other evidence regarding the value of the subject property." On August 11, 2015, Judge Enslen filed in each action a notice of appeal to the Alabama Supreme Court. That court subsequently transferred the appeals to this court, pursuant to Ala. Code 1975, § 12-2-7(6). The appeals have been consolidated by this court ex mero motu.

Discussion

We initially note that the DOT has argued that Judge Enslen lacks standing to appeal in these actions. Judge Enslen appealed from the circuit court's orders purportedly pursuant to Ala. Code 1975, § 12-22-6, which provides, in pertinent part, that "[a]ppeals may be taken to the appropriate appellate court from the judgment of the circuit court on application for writs of ... mandamus ...." Judge Enslen cites several cases in which judges sought review from appellate courts after writs of mandamus had been issued to them. See, e.g., Ex parte State ex rel. Alabama Policy Inst., [Ms. 1140460, March 3, 2015] ___ So. 3d ___, ___ (Ala. 2015); Ex parte Vance, 900 So. 2d 394 (Ala. 2004); and Ex parte

Calhoun, 688 So. 2d 259 (Ala. 1997). However, none of those cases involve an appeal of a mandamus order under § 12-22-6. Thus, this case raises an issue of first impression as to whether a probate-court judge has standing to appeal from a writ of mandamus issued by a circuit court.

"Only a party prejudiced or aggrieved by a judgment can appeal. ... 'A party cannot claim error where no adverse ruling is made against him.'" Alcazar Shrine Temple v. Montgomery Cty. Sheriff's Dep't, 868 So. 2d 1093, 1094 (Ala. 2003) (quoting Holloway v. Robertson, 500 So. 2d 1056, 1059 (Ala. 1986)). Although we have found no Alabama law on the specific issue at hand, persuasive authority from other jurisdictions indicates that, when a respondent judge in a circuit-court mandamus proceeding is merely a nominal party, the judge may not appeal. In People v. Recorder's Court Judge, 66 Mich. App. 315, 316, 239 N.W.2d 185, 185 (1975), the Michigan Court of Appeals held that "a judge, who was the nominal defendant in the circuit court, [is not] an aggrieved party before [the appellate court] ... who has standing to appeal an order of superintending control issued by the circuit court." See also Bender v. Ragan, 53 Wash. 521, 522,

102 P. 427, 428 (1909) (noting that, in mandamus proceedings, "the judge of the court is a mere nominal party").

In appellate proceedings in this state, Rule 21(b), Ala. R. App. P., allows a respondent judge, who is only a nominal party in a mandamus proceeding, to opt out of the proceedings.[1] The Committee Comments to Rule 21 state, in pertinent part:

> "If the judge who is named as respondent does not desire to appear in the proceeding, he may so advise the clerk of the appellate court and the parties. His failure to appear does not admit that the petition is to be granted. This provision simply recognizes the reality that mandamus proceedings are in most instances adversary proceedings between the parties to the litigation below, and that the judge is really a nominal party rather than an active party. There are, however, instances in which the judge would consider that he is directly affected and would wish to appear, and the rule permits this. Since the counsel for the opposing party ordinarily files the brief for the judge, this practice would be given a straightforward literal application rather than continuing in the guise of a proceeding in the judge's name."

(Emphasis added.) In this case, when the DOT filed its petitions for a writ of mandamus in the circuit court, the DOT served Judge Enslen, but Judge Enslen never answered the petitions or otherwise appeared in the proceedings. Mercer

[1]Rule 21 does not apply to mandamus proceedings in the circuit courts. See Rule 1, Ala. R. App. P.

Properties and Willow Bend Properties filed responses to the petitions. The circuit court held oral argument and ruled on the petitions without Judge Enslen participating in any of the proceedings.

In his brief to this court, Judge Enslen maintains that the circuit court erred in construing § 18-1A-281, Ala. Code 1975, and in ordering him to reinstate the eminent-domain proceedings without requiring additional evidence of the value of the properties. In essence, Judge Enslen complains that the circuit court ordered him to perform a legally erroneous act. However, Judge Enslen does not argue that the circuit court ordered him to perform a legally impermissible act that would subject Judge Enslen to personal or even official liability. Thus, Judge Enslen has not been personally "aggrieved" by the writs of mandamus issued by the circuit court. We, therefore, conclude that Judge Enslen was merely a nominal party in the cases at issue and, therefore, lacks

standing to appeal.[2] Accordingly, we dismiss the appeals in both cases.

2140963 -- APPEAL DISMISSED.

2140964 -- APPEAL DISMISSED.

Pittman, Thomas, and Donaldson, JJ., concur.

Thompson, P.J., concurs in the result, with writing.

[2]For that reason, we do not address Judge Enslen's other arguments on appeal. Accordingly, we do not express any opinion as to whether the circuit court acquired jurisdiction and properly issued the writs of mandamus.

THOMPSON, Presiding Judge, concurring in the result.

I agree with the main opinion that Judge John E. Enslen does not have standing, in his capacity as probate judge of Elmore County, to appeal the judgments of the Elmore Circuit Court ("the trial court") in these actions. Lack of standing is a jurisdictional defect. State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1027 (Ala. 1999). Therefore, I agree with the main opinion's decision to dismiss the appeals. See Cadle Co. v. Shabani, 4 So. 3d 460, 463 (Ala. 2008) (holding that, in the absence of subject-matter jurisdiction because of a lack of standing, the court must dismiss the action); Goodyear Tire & Rubber Co. v. Moore, 900 So. 2d 1239, 1240 (Ala. Civ. App. 2004) ("Therefore, because the company in the present case lacks standing to seek appellate review ..., we must dismiss this appeal.").

"Standing ... turns on 'whether the party has been injured in fact and whether the injury is to a legally protected right.'" State v. Property at 2018 Rainbow Drive, 740 So. 2d at 1027. Generally,"[t]o have standing to appeal a judgment, one must have been a party to the judgment below." Triple J Cattle, Inc. v. Chambers, 621 So. 2d 1221, 1223 (Ala.

1993); see also Boschert Merrifield Consultants, Inc. v. Masonite Corp., 897 So. 2d 1048, 1051 (Ala. 2004) (same), and Daughtry v. Mobile Cty. Sheriff's Dep't ex rel. Purvis, 536 So. 2d 953, 954 (Ala. 1988) (same). Judge Enslen was not a party to the actions below.

I agree with the main opinion that Judge Enslen was, at most, a "nominal party" to the petitions for writ of mandamus filed in the trial court. Alabama law does not contain a definition of the term "nominal defendant," but Black's Law Dictionary contains an entry for that term that refers us to the term "nominal party." A "nominal party" is

> "[a] party to an action who has no control over it and no financial interest in its outcome; esp., a party who has some immaterial interest in the subject matter of a lawsuit, and who will not be affected by any judgment, but who is nonetheless joined in the lawsuit to avoid procedural defects."

Black's Law Dictionary, 1298 (10th ed. 2014). In earlier editions, Black's contained the following definition for the term "nominal defendant":

> "A person who is joined as defendant in an action, not because he is immediately liable in damages or because any specific relief is demanded as against him, but because his connection with the subject-matter is such that the plaintiff's action would be defective, under the

> technical rules of practice, if he were not joined."

Black's Law Dictionary 1049 (6th ed. 1990); see also Soderlund v. Administrative Dir. of Courts, 96 Haw. 114, 119-20, 26 P.3d 1214, 1219-20 (2001) (quoting the sixth edition of Black's Law Dictionary in defining "nominal defendant"), and Bromley Grp., Ltd. v. Arizona Dep't of Revenue, 170 Ariz. 532, 539, 826 P.2d 1158, 1165 (Ct. App. 1991) (quoting the fifth edition of Black's Law Dictionary, which contained the same definition as the sixth edition, in defining "nominal defendant"). "As these definitions demonstrate, abstention from actively participating as an advocate is not the only defining characteristic of a nominal party. To qualify as a nominal party, a defendant must also lack any pecuniary or proprietary stake in the outcome of the action." Bromley Grp., Ltd. v. Arizona Dep't of Revenue, 170 Ariz. at 539, 826 P.2d at 1165. Given the foregoing, I agree that Judge Enslen is a nominal party to the proceedings below. The main opinion notes that Judge Enslen did not participate in the mandamus proceedings in the trial court. To the extent the main opinion might imply otherwise, however, I do not agree that if Judge Enslen had participated in the mandamus proceedings, such

participation would afford him standing to appeal the judgments entered in those actions; Judge Enslen would remain a nominal party to those actions.

In responding in his reply brief to the standing argument asserted by the Alabama Department of Transportation ("ALDOT") in its appellate brief, Judge Enslen argues that he has standing to appeal what he contends are erroneous judgments pertaining to the parties to the condemnation actions because, he says, he is a public official who has a duty to uphold the law. Judge Enslen contends in his reply brief that, because he believes that the trial court's orders were erroneous, he "cannot in good conscience silently comply with the mandamus [orders] because he views [doing so] as a flagrant violation of the rights of the citizens under the responsibility of his county office." Judge Enslen cites several cases in which our supreme court has considered petitions for a writ of mandamus seeking extraordinary relief filed by lower-court judges, including one case in which Judge Enslen sought emergency relief from our supreme court. See Ex parte State ex rel. Alabama Policy Institute, [Ms. 1140460, March 3, 2015] ___ So. 3d ____ (Ala. 2015); Ex parte Vance, 900 So. 2d 394 (Ala.

2004); Ex parte Sharp, 893 So. 2d 571 (Ala. 2003); and Ex parte Calhoun, 688 So. 2d 259 (Ala. 1997). In those opinions, the issue of the standing of the lower-court judge who sought relief in the supreme court was not addressed by that court. However, the circumstances under which the requests for extraordinary relief raised in those petitions for a writ of mandamus were addressed by our supreme court are distinguishable from the circumstances of these cases, in which Judge Enslen has attempted to appeal from orders of the trial court.

Ex parte Calhoun and Ex parte Vance both involved issues regarding the authority the lower-court judges could exercise in their own courts; those opinions did not address the propriety or the correctness of the merits of the issues the parties presented for resolution. In Ex parte State ex rel. Alabama Policy Institute, supra, our supreme court concluded that Judge Enslen had standing to petition the supreme court for extraordinary emergency relief because the issue in that case—the authority of a court to issue marriage licenses to same-sex couples—impacted the ministerial duties of his job as a probate judge in this state. In Ex parte Sharp, supra,

the lower-court judge filed a petition for a writ of mandamus pertaining to a writ of prohibition issued to the lower-court judge by the Court of Criminal Appeals. However, the defendant in a capital-murder action at issue in Ex parte Sharp, who clearly had standing, also filed a petition for a writ of mandamus raising the same issues, and the two petitions for extraordinary relief were consolidated and addressed in one opinion.[3]

In these cases, Judge Enslen argues that the trial court erred in entering its orders; he maintains in his appeals that the parties did not properly invoke the jurisdiction of the trial court and that the relief granted by the trial court was erroneous. Judge Enslen also argues that he is attempting to protect the citizens of his county from improper orders. However, there does not appear to be a matter of public

[3]We also note that it can be argued that, given the nature of the order issued by the lower-court judge in Ex parte Sharp, supra, the lower-court judge could arguably be said to have acted in compliance with a duty to the public to ensure the appropriate prosecution of one accused of capital murder. See Ex parte State ex rel. Alabama Policy Institute, ___ So. 3d at ___ (discussing the issue of standing in the context of a public official acting in regard to an issue of great public interest).

interest at issue here.[4] Rather, these actions involve the condemnation of private property, and the arguments Judge Enslen asserts benefit Mercer Properties, Inc., and Willow Bend Properties, Inc., neither of which sought appellate relief from the trial court's orders. See Hillyard v. Leonard, 431 S.W.2d 187, 188 (Mo. 1968) ("Obviously, appellant [(who the court found to be a nominal defendant)] has no standing to present an issue of the fairness of the decree. He was not a party to the settlement agreement and could not be aggrieved thereby. He seeks merely to appeal the case on behalf of noncomplaining plaintiffs.").

The extraordinary relief available pursuant to a petition for a writ of mandamus might be available to Judge Enslen if he were seeking relief on the basis that the law or a court was requiring him to perform an impermissible act. As the main opinion concludes, however, in his appeals addressing the merits of the judgments below, Judge Enslen is advocating against what he maintains is a legally incorrect ruling. Although this court might recognize

[4]Judge Enslen concedes in his reply brief that he does not have standing under the public-interest theory set forth in Ex parte State ex rel. Alabama Policy Institute, supra.

> "the practice of naming the court or judge whose action is complained of as a nominal defendant ... simply because he is the proper person or official to furnish the reviewing court a duly authenticated record of the case to be reviewed[, ... w]e know of no rule which makes it competent for the justice of the peace whose judicial act is sought to be reviewed or set aside to sue out certiorari in his own right for the purpose of invaliding a ruling made by a superior court."

Travis v. District Court of Dallas Cty., 199 Iowa 653, ___, 192 N.W. 835, 836 (1923).

Judge Enslen's position is that he has standing to appeal orders that he does not believe were correctly reached so that he cannot be compelled to comply with such orders. The decisions of lower-court judges are often reversed or overruled by higher courts, and lower-court judges might often believe that the higher court's ruling is erroneous. Judge Enslen's argument, if applied to other judges and courts, would allow any judge of this state to appeal an order with which he or she disagrees, or regarding which he or she questions the higher court's authority to enter, and perhaps to raise issues and arguments not contemplated by the parties to the action when the matter was originally litigated before the lower-court judge. Under such circumstances, a trial-court judge, or perhaps a judge from this court, could

conceivably attempt to seek review of decisions of the Alabama Supreme Court to the United States Supreme Court. Such circumstances would also place lower-court judges in the precarious position of possibly being seen as advocating on behalf of certain parties to the action in which the lower-court judge had just ruled, which might call into question the judge's impartiality.

In these cases, the issue is the propriety of orders allowing the condemnation of specific parcels of private property. I recognize that Judge Enslen, in briefing one of his issues, questions the jurisdiction of the trial court to enter its orders. However, I believe that that is an issue to be raised by the private parties impacted by the trial court's orders. Although I sympathize with Judge Enslen and can identify with his frustration in being compelled to act in accordance with what he believes are incorrect or improper orders from a higher court, I do not believe that Judge Enslen has suffered an injury to a legally protected right such that he has standing to appeal those orders. See State v. Property at 2018 Rainbow Drive, supra. Therefore, I concur in the result.