IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MAY 28, 2020
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2019-SC-000195-MR

METROPOLITAN HOUSING COALITION, ASSOCIATION OF COMMUNITY MINISTRIES, AND COMMUNITY ACTION COUNCIL FOR LEXINGTON-FAYETTE, BOURBON, HARRISON AND NICHOLAS COUNTIES, INC. — APPELLANTS

V.

ON APPEAL FROM COURT OF APPEALS
NO. 2018-CA-001859
FRANKLIN CIRCUIT COURT NO. 18-CI-01115

HON. PHILLIP J. SHEPHERD, JUDGE, IN HIS CAPACITY AS FRANKLIN CIRCUIT JUDGE, DIV. 1 — APPELLEE

AND

PUBLIC SERVICE COMMISSION OF KENTUCKY — REAL PARTY IN INTEREST

AND

2019-SC-000196-MR

SIERRA CLUB AND ITS INDIVIDUAL MEMBERS, ALICE HOWELL, CARL VOGEL, AMY WATERS AND JOE DUTKIEWICZ, REAL PARTIES IN INTEREST — APPELLANTS

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MEMORANDUM OPINION OF THE COURT

REVERSING

This case involves an appeal from a writ of prohibition the Court of Appeals issued against Franklin Circuit Court Judge Phillip J. Shepherd. In the underlying case, Louisville Gas & Electric Company (LG&E) and Kentucky Utilities Company (KU) had each filed an application with the Kentucky Public Service Commission to raise their base rates. These applications triggered administrative proceedings before the Commission pursuant to Kentucky Revised Statutes (KRS) Chapter 278. Since LG&E and KU are under common ownership, the cases were heard together.

Appellants (real parties in interest below, Metropolitan Housing Coalition; Association of Community Ministries; Community Action Council for Lexington-Fayette, Bourbon, Harrison, and Nicholas Counties, Inc.; and Sierra Club and its members, Alice Howell, Carl Vogel, Amy Waters, and Joe Dutkiewicz) sought to intervene in the hearings before the Commission. Though the Commission allowed several other entities to intervene, it denied Appellants' request. Appellants sought review of the Commission's order denying intervention in Franklin Circuit Court.

On November 21, 2018, the Franklin Circuit Court issued a temporary injunction enjoining the Commission from preventing Appellants' full participation in the rate cases as intervening parties. On December 17, 2018, the Commission filed a petition for a writ of prohibition with the Court of Appeals, seeking the appellate court to prohibit the Franklin Circuit Court from acting in the case. The Commission did not ask the Court of Appeals to issue an order staying the Franklin Circuit Court proceedings. While the writ was pending before the Court of Appeals, both the underlying rate cases before the Commission and the circuit court case proceeded. On March 5, 2019, two significant events occurred: (1) the Commission convened the first day of a two-day hearing in the rate cases, with Appellants fully participating as intervening parties; and (2) the Franklin Circuit Court entered its final opinion and order in the case before it—issuing a permanent injunction enjoining the Commission from preventing Appellants' intervention in the rate cases. The very next day, March 6, 2019, the Court of Appeals issued an opinion and order granting the Commission's writ petition to prohibit the Franklin Circuit Court from taking further action in the case. After finding out about the Court of Appeals' order, the Commission immediately dismissed Appellants as intervening parties and they were not allowed to present or cross-examine witnesses on the second day of hearings on the rate cases.

Because the Court of Appeals issued its order a day after the Franklin Circuit Court issued its order fully disposing of the case and remanding to the Commission, Appellants filed a joint motion asking the Court of Appeals to

reconsider its order. The Court of Appeals denied that motion and this appeal followed.

At the outset, we note that "[a]ppellate courts lack subject matter jurisdiction to decide cases that have become moot." *Commonwealth, Kentucky Bd. of Nursing v. Sullivan University System, Inc.*, 433 S.W.3d 341, 343 (Ky. 2014) (citing *Veith v. City of Louisville,* 355 S.W.2d 295, 297–98 (Ky. 1962)). Therefore, before taking up the other errors Appellants allege, we must first determine whether this case is moot.

In *Morgan v. Getter*, 441 S.W.3d 94, 98–99 (Ky. 2014), we explained:

> As our courts have long recognized, "[a] 'moot case' is one which seeks to get a judgment . . . upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a *then* existing controversy." *Benton v. Clay,* 192 Ky. 497, 233 S.W. 1041, 1042 (1921) (citation and internal quotation marks omitted; emphasis in original).

We went on to state that "[t]he concern underlying this rule as to mootness is ultimately the role of the courts within our system of separated powers, a role that does not extend to the issuance of merely advisory opinions." *Id*. at 99 (citing *Commonwealth, Dep't of Corr. v. Engle,* 302 S.W.3d 60 (Ky. 2010)).

Under the guidance of our precedent, then, we must first determine whether the writ sought "a judgment . . . upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a *then* existing controversy." *Benton* 233 S.W. at 1042. We hold that the writ could have no practical effect upon the controversy—and was, thus, moot when the Court of Appeals granted it.

When the Court of Appeals granted the writ of prohibition, holding that the Franklin Circuit Court lacked jurisdiction, the circuit court had already rendered an order disposing of all the issues before it and remanding the matter to the Commission for further proceedings. We agree with our reasoning from an unpublished opinion that "the trial court was neither *acting* nor *about to act* erroneously for the simple reason that it *had already acted*. At that point, the matter was moot." *Hillman v. Perry*, 2009-SC-000276-MR, 2010 WL 252250, at *2 (Ky. Jan. 21, 2010) (emphasis added). Just as in *Hillman*, in the case at bar, the circuit court was neither *proceeding* nor *about to proceed*. It *had already proceeded*. There was simply nothing left for the Court of Appeals' writ of prohibition to prohibit.

In an earlier published case, *Bock v. Graves*, 804 S.W.2d 6, 9 (Ky. 1991), this Court also took up the issue. In *Bock*, the Court of Appeals had denied the Appellant's motion for a stay in the circuit court proceedings while it considered original action for writs of prohibition and mandamus. The circuit court entered a final order while the writ action was still pending. We stated:

> We will first discuss the Petition for Writ of Prohibition to prohibit Judge Graves from proceeding further in the matter. This issue is now moot in light of the fact that the Court of Appeals denied appellant's Motion for A Stay and Judge Graves has entered a Final Order . . . .

Id. In the present case, just as in *Bock*, there was no stay in the circuit court proceedings preventing finality during the pendency of the writ action (in fact, in the case at bar, the Commission did not even seek a stay). We have recognized that "CR 76.36 contains no provision providing that the pendency of

the original action in the Court of Appeals would abate or forestall the finality of his case in the trial court." *Hillman*, 2010 WL 252250, at *2.

The Commission argues that the circuit court still maintained jurisdiction of the case for ten days and *could have potentially* entered further orders acting outside its jurisdiction, and, for this reason, the Court of Appeals' opinion and order was appropriate. However, we note that it was acting as an appellate court hearing an administrative appeal. Kentucky Rules of Civil Procedure 76.38(1) provides: "[u]nless otherwise directed, all orders of an appellate court, including those in original proceedings under Rule 76.36, are effective upon entry and filing with the clerk. A decision or ruling styled an 'Opinion and Order' is an order." In this case, both the Franklin Circuit Court and the Court of Appeals (which was considering a writ under CR 76.36) fell under this rule. Therefore, the circuit court's order became effective prior to the entry of the Court of Appeals' order.

Our standard for first-class writs is clear—the lower court must be "proceeding" or "about to proceed" outside its jurisdiction. Here, by the time the Court of Appeals granted the writ, the Franklin Circuit Court had already entered an order disposing of the case and remanding it to the Commission. There was nothing left for the Court of Appeals to prohibit that court from doing.

The Court of Appeals granted the writ sought by the Commission. However, because the Franklin Circuit Court had already issued a final disposition of the matter and remanded the case back to the Commission for

further proceedings prior to the entry of the writ, we hold that the issue was moot.

As we have held, "mootness is a threshold matter for a reviewing court to resolve." *Sullivan University*, 433 S.W.3d at 343. Furthermore, this Court is required to address its own subject matter jurisdiction sua sponte when necessary. *Ky. High School Athletic Ass'n v. Edwards,* 256 S.W.3d 1, 4 (Ky. 2008).[1] Because the matter was moot, the Court of Appeals lacked subject matter jurisdiction.

Along with failing to pass the mootness threshold, this case also fails to meet our writ standard. Thus, we will not delve into this Court's exceptions to mootness herein.

The issuance of a writ is an extraordinary remedy, and we have always been cautious and conservative in granting such relief. *Grange Mut. Ins. v. Trude*, 151 S.W.3d 803, 808 (Ky. 2004). Our oft-cited writ standard provides

> A writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

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[1] While the other Appellants raise the issue of mootness in their brief, the Sierra Club "does not press the argument that the Court of Appeals' Writ Order was improper and void on that procedural ground." However, since mootness is a threshold issue for this Court to determine, the abandonment of this issue has no impact upon our holding. This Opinion and Order impacts all Appellants equally.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004). Relevant to this matter, the Commission sought a writ of the first class, arguing the Franklin Circuit Court lacked subject matter jurisdiction. Therefore, pursuant to *Hoskins*, before the Court of Appeals could exercise its discretion in granting the writ, it had to find that (1) the Franklin Circuit Court was "proceeding or [was] about to proceed outside of its jurisdiction" and (2) that "there [was] no remedy through an application to an intermediate court." *Id.*

The Franklin Circuit Court's final opinion and order had disposed of all issues regarding all parties and granted a permanent injunction. That final order has been appealed to the Court of Appeals, where it is currently held in abeyance pending the outcome of the present cases. The order was effective upon entry and was appealable at that time. Since the Franklin Circuit Court's order was appealable at that time, "there [was a] remedy through an application to an intermediate court." Therefore, the Commission cannot meet the second hurdle for a first-class writ: that "there [was] no remedy through an application to an intermediate court." *Id.*

In summary, this case is moot as its outcome "when rendered, for any reason, cannot have any practical legal effect upon a *then* existing controversy." *Benton*, 233 S.W. at 1042. Furthermore, we will not analyze whether any exceptions to mootness apply in this case, as, even if we found an exception applicable, the writ standard was not met. Since the matter was

moot *and* the Court of Appeals erred in its application of our writ standard, we will not delve into the important substantive issues this case presents.

All sitting. All concur.

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