
SC84679

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. JEREMIAH W. (JAY) NIXON,
AND
CARROLL COUNTY TRUST COMPANY,

Relators,

v.

THE HONORABLE JOHN R. HUTCHERSON,
Retired, Circuit Judge, 8th Judicial Circuit, Ray County,

Respondent.

Relator Attorney General's Brief
in Support of Petition for Writ of Prohibition

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JURISDICTIONAL STATEMENT

This petition arises out of an order issued by the Honorable John Hutcherson, Circuit Court of Ray County, certifying a class represented by Plaintiffs Hall, Carr, and Gilbow. In a case before the Honorable Judge Hutcherson, the individual plaintiff Lucille Palmer claims breaches of trust by Carroll County Trust Company, trustee of the Axtell Trust, with regard to the lifetime income she is to receive under the terms of the trust and seeks an accounting of the trust. The class plaintiffs claim breaches of trust by Carroll County Trust Company, trustee of the Axtell Trust, with regard to the portions of the trust referring to the stock ranch and educational fund.

The Attorney General sought a writ from the Missouri Court of Appeals, Western District, prohibiting the respondent from abusing his discretion in certifying the class and proceeding to hear the case as a class action, and directing the dismissal of the claims of class plaintiffs Hall, Carr, and Gilbow. The Court of Appeals denied the petition in prohibition. Relator Attorney General then sought a writ from this court. This court has jurisdiction to issue an original writ in prohibition, Mo. Const. Art. V, §4.1 and §530.020, RSMo 2000.

STATEMENT OF FACTS

Mary Katherine Axtell created a will and testamentary trust in June 1955. *App. A3*. Those documents established the charitable Axtell Trust. *App. A2-3*. Ms. Axtell died February 23, 1960. *App. A16*.

The will provides that several life beneficiaries, including Lucille Palmer, a plaintiff in the underlying matter, will receive net income from real property located in Ray and Carroll counties. *App. A2-3*. Following the death of the last life beneficiary, the income from that property will be paid to an endowment fund. *App. A3*. The fund will then provide funding for higher education to capable and financially needy children in Ray and Carroll counties. *App. A3*.

The will also provides for the disposition of another piece of real property located in Ray County. *App. A1*. This piece of property is to be developed into a stock ranch. *App. A1*. Subsequently, if there are funds available, the stock ranch is to be developed into a boarding ranch to teach children from the ages of five to twelve them about farm life. *App. A1*.

Neither the will nor the Trust establishes a source of income for the development of the stock or boarding ranch. Ms. Axtell's will and Trust merely set aside the piece of property for the development of the stock ranch. *App. A1*. Moreover, neither document authorizes the trustee to divert funds from the life beneficiaries or the endowment fund in order to develop the stock ranch.

Plaintiff Lucille Palmer is the sole remaining life beneficiary under the will. *App. A1*. She seeks an accounting of the Trust, asserting a breach of trust by the trustee, Carroll County Trust Company. *App. A13-42*. The class plaintiffs claim a breach of trust by the trustee for failure to provide scholarships or create the stock ranch and develop it into the boarding ranch. *App. 13-42*. The class is represented by named plaintiffs Hall, Carr, and Gilbow. *App. A13-42*. They originally filed as individuals, along with Lucille Palmer, on February 22, 1999. *App. A8*. After defendants Carroll County Trust Company and Attorney General Nixon moved to dismiss for lack of standing, the class plaintiffs filed a motion to certify the class on January 13, 2000. *App. A8-12*. The petition was then amended February 29, 2000. *App. A13-42*.

The class plaintiffs are not life beneficiaries under the will. They are not specifically named anywhere in the will or the Trust. They are suing as residents of Ray and Carroll counties. *App. A13-14*. The named plaintiffs purport to represent a class of plaintiffs consisting of residents of Ray and Carroll counties who graduated from high school in Ray or Carroll county from 1960 through the present and who would have sought, or currently seek, funds from the endowment fund for further education under the terms of the Trust; or those who sought or seek to learn about farm life on the boarding ranch. *App. A13-14*.

Both Carroll County Trust Company and the Attorney General, relators herein and defendants in the underlying matter, moved to dismiss all the counts except those of

plaintiff Palmer, asserting that the claims were not ripe and that the class plaintiffs did not have standing to assert their claims. The trial court denied the motions to dismiss.

Relator Attorney General filed a second motion to dismiss based on claims not addressed by the order denying the first motions to dismiss. The court failed to rule on that motion.

The trial court certified the class on March 25, 2002. *App. A4-7*. Relator Attorney General filed a Petition in Prohibition in the Missouri Court of Appeals for the Western District, which was denied. *App. A43*. Relator Attorney General then filed a Petition in Prohibition with this court. Relator Carroll County Trust Company was granted leave to intervene as an additional relator. *App. A44*. This court issued a Preliminary Writ on August 27, 2002. *App. A45*. Respondent answered the petition and this follows.

POINTS RELIED ON

I.

Relator is entitled to an order prohibiting Respondent from certifying the class and proceeding to hear the case as a class action and directing him to dismiss the claims of the class plaintiffs because the class plaintiffs have no standing to assert their claims in that the Axtell Trust is a charitable trust and only the Attorney General has standing to bring suit to protect a charitable trust.

Dickey v. Volker, 11 S.W.2d 278 (Mo. 1928).

Molumby et al. v. Shapleigh Hardware Co., 395 S.W.2d 221

(Mo. App. St. Louis Dist. 1965)

State ex rel. Central Institute for the Deaf v. Burger, 947 S.W.2d 126

(Mo. App. E.D. 1997).

Voelker et al. v. St. Louis Mercantile Library Association et al., 359 S.W.2d

689 (Mo. 1962).

II.

Relator is entitled to an order prohibiting Respondent from certifying the class and proceeding to hear the case as a class action and directing him to dismiss the claims of the class plaintiffs because their claims are not ripe for adjudication in that under the terms of the Trust, the charitable provisions are not triggered until twenty

years after the death of the last life beneficiary and Lucille Palmer, a plaintiff in the underlying action, is still living.

Ferrell v. Mercantile Trust Company, 490 S.W.2d 397 (Mo. App. 1973)

III.

Relator is entitled to an order prohibiting Respondent from certifying the class and proceeding to hear the case as a class action and directing him to dismiss the class plaintiffs because they cannot satisfy the class certification requirements of Rule 52.08 in that the class plaintiffs can neither adequately protect the interests of the entire class, nor satisfy the requirement of typicality.

Beatty v. Metropolitan St. Louis Sewer District, 914 S.W.2d 791

(Mo. 1995).

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976).

Voelker et al. v. Shapleigh Hardware Company, 359 S.W.2d 689

(Mo. 1962).

IV.

Relator is entitled to an order prohibiting Respondent from certifying the class and proceeding to hear the case as a class action and directing him to dismiss the claims of class plaintiffs because the class plaintiffs did not meet their burden of producing significant and persuasive evidence that showed class certification was

**proper in that class plaintiffs failed to produce more than “sketchy and conclusory”
allegations that merely reiterated the rule.**

Murray et al. v. Rent-A-Center Inc., 2001 U.S. Dist. LEXIS 19339

(W.D.Mo. May 11, 2001).

Trotter v. Klincar, 748 F.2d 1177 (7th Cir. 1984).

STANDARD FOR PROHIBITION

Prohibition is a means to prevent usurpation of judicial power and confine inferior courts to their proper jurisdiction. *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862 (Mo. 1986); *see also State ex rel. Kerns v. Cain*, 8 S.W.3d 212, 214 (Mo. App. W.D. 1999). In this case the circuit court exceeded its jurisdiction when it certified a class of plaintiffs represented by Hall, Carr, and Gilbow.¹ The class plaintiffs do not have standing to assert their claims. Moreover, even if they had standing, their claims are not ripe and they cannot satisfy the requirements for class certification in Rule 52.08. Therefore, the circuit court acted outside the scope of its jurisdiction and prohibition is proper. *Birdsong et al. v. Adolf*, 724 S.W.2d 731, 732 (Mo. App. E.D. 1987).

There are two prerequisites for a writ of prohibition. *Lohman v. Personnel Advisory Bd.*, 948 S.W.2d 701, 703 (Mo. App. W.D. 1997). First, there must be a lack of an adequate remedy at law. *Id.* Here, there is no opportunity of a timely appeal.

Because Rule 52.08 of the Missouri Rules of Civil Procedure is identical to Rule 23 of the Federal Rules of Civil Procedure, we can consider federal precedent. *Ralph et al. v. Am. Cablevision of Kansas City, Inc.*, 809 S.W.2d 173, 174 (Mo. App. E.D. 1991). “[A]n order either granting or denying the certification of a class is not a ‘final decision’ within the meaning of 28 USC §1291 that would authorize an appeal to the Eighth Circuit

¹ Relator does not object to Plaintiff Palmer’s right to assert her claims.

as a matter of right.” *Wilson et al. v. Am. Cablevision of Kansas City, Inc.*, 130 F.R.D. 404, 406 (W.D. Mo. 1990). This is because these orders do not terminate litigation. *Id.* If the judge denies certification at the outset, or during litigation decertifies a class, the plaintiffs can proceed as individuals. If the class is certified, the matter continues as a class action. None of these rulings terminate the litigation. Because the circuit court’s order certifying the class is not a final judgment for the purposes of appeal, those opposing class certification must proceed through a trial before testing the rights of the named plaintiffs to even assert a claim.

A later appeal is not an adequate remedy. While the relator could appeal the issue of class certification at the end of the litigation, it would be a waste of scarce judicial resources. *State ex rel. State of Missouri, Dep’t. of Agric. v. McHenry*, 687 S.W.2d 178, 181 (Mo. 1985). Waiting until the end of litigation to appeal class certification, would leave the relator open to a case with “burdensome discovery” as well as a trial. *Id.* The relator should not have to burden himself with an appeal at the end of a trial simply because the trial court acted beyond its jurisdiction. Relator has no adequate remedy at law and the writ should be issued.

Second, in order for a writ of prohibition to lie, there must be the absence of jurisdiction in the tribunal before which the underlying matter is pending. *Id.* Class plaintiffs had no standing to bring their claims. Moreover, even if they did have standing, the claims are not ripe and they cannot satisfy the class certification requirements in

52.08. Thus, the circuit court had no jurisdiction to grant the order certifying the class. Therefore, the writ is appropriate. Relator has satisfied both requirements for a writ of prohibition and the writ should be issued.

ARGUMENT

I.

Relator is entitled to an order prohibiting Respondent from certifying the class and proceeding to hear the case as a class action and directing him to dismiss the claims of the class plaintiffs because the class plaintiffs have no standing to assert their claims in that the Axtell Trust is a charitable trust and only the Attorney General has standing to bring suit to protect a charitable trust.

The underlying case does not involve claims by named beneficiaries of a trust (except Lucille Palmer). The beneficiaries of the Trust are the general public. The relevant case law demonstrates that it is the Attorney General, not the plaintiffs, who in that circumstance has standing to sue for violation of a charitable trust. That the plaintiffs obtained class certification does not circumvent the case law.

The standing requirement exists to ensure that litigation is brought only by “appropriate parties having a present, substantial interest in the outcome.” *Hinton v. City of St. Joseph et al.*, 889 S.W.2d 854, 858 (Mo. App. W.D. 1994). Standing requires that the complainant have a “legally cognizable interest” in the case and that he have either an actual injury or a threatened injury. *State ex rel Ryan v. Carnahan et al.*, 960 S.W.2d 549, 550 (Mo. App. E.D. 1998). It also serves to conserve scarce judicial resources. *Id.* at 550-51. Importantly, if a party does not have standing to maintain the action and thus no right to relief, “the trial court necessarily lacks jurisdiction of the question presented and

cannot enter a judgment on the counts.” *Id.* at 550. If the plaintiffs in an action do not have the right to bring the action themselves then they cannot solve the problem of standing by bringing the action as representatives of a class of plaintiffs. *Molumby et al. v. Shapleigh Hardware Co.*, 395 S.W.2d 221, 228 (Mo. App. St. Louis District 1965).

Only the Attorney General has standing to bring suit to protect a charitable trust. *State ex rel Central Institute for the Deaf et al. v. Burger*, 947 S.W.2d 126, 127 (Mo. App. E.D. 1997). The essence of a charitable trust is that there are uncertain, indefinite or innumerable individuals (i.e. the general public) who could benefit from the trust. *Voelker et al. v. St. Louis Mercantile Library Assn. et al.*, 359 S.W.2d 689, 693 (Mo. 1962). As a general rule, charitable trusts are not enforceable by potential beneficiaries or members of the general public. *Dickey v. Volker*, 11 S.W.2d 278, 282 (Mo. 1928). Because the use is for the public in general, any individual’s interest is “so trifling he should not be permitted to maintain the suit.” *Dickey*, 11 S.W.2d at 285. “Suits alleging mismanagement or misuse of public charitable funds must generally be brought by the Attorney General.” *State ex rel Central Institute for the Deaf*, 947 S.W.2d at 127. Thus, the action is for the Attorney General to bring in the interest of the public.

There is no dispute that the Axtell Trust is a charitable trust. Following the death of the survivor of the life beneficiaries, Ms. Axtell intended to benefit the general public. Specifically, she provided for an endowment fund for educational support to capable and financially needy children in Ray or Carroll County. Plaintiffs, as residents of Ray and

Carroll counties are only potential beneficiaries and do not have standing to enforce the Trust.

In a very few cases, as an exception to the rule, beneficiaries have such a special interest in the performance of the trust that they may bring suit to enforce it. The special interest must be so different from what the Attorney General represents that there could be a conflict of interest for the Attorney General to represent both the public and the special interest. *Dickey*, 11 S.W.2d at 281; *see also, German Evangelical St. Marcus Congregation of St. Louis v. Archambault*, 404 S.W.2d 705, 707-708 (Mo 1966). But in our case, the class plaintiffs have alleged no special interest different from that of the general public. Therefore, the class plaintiffs have no standing to bring their claim and the circuit court abused its discretion by certifying a class of individuals who do not have standing. The writ is appropriate.

II.

Relator is entitled to an order prohibiting Respondent from certifying the class and proceeding to hear the case as a class action and directing him to dismiss the claims of the class plaintiffs because their claims are not ripe for adjudication in that under the terms of the Trust, the charitable provisions are not triggered until twenty years after the death of the last life beneficiary and Lucille Palmer, a plaintiff in the underlying action, is still living.

A plaintiff cannot file suit to seek a declaration to determine future rights or controversies in anticipation of events that have not occurred. *Ferrell v. Mercantile Trust Co.*, 490 S.W.2d 397, 400 (Mo. App. 1973). Ms. Axtell's Trust provides that income from farm land in Ray and Carroll counties will be accrued for the benefit of named life beneficiaries. *App. A2-3*. Twenty years after the death of the survivor of the life beneficiaries, the trustee shall pay the net income from one portion of farm land to an endowment fund to be used for the higher education of capable children of Ray and Carroll Counties. *App. A3*. Therefore, the charitable provisions of the Trust do not take effect until twenty years after the death of the last life beneficiary. Lucille Palmer is one of those named life beneficiaries. *App. A2*. Ms. Palmer is still living and in fact, is a plaintiff in the underlying matter. *App. A13*. Therefore, the class plaintiffs' claims that the Trustees failed to distribute funds under this portion of the Trust are not ripe.

The class plaintiffs' claims that the trustees' failure to develop the stock ranch constitutes a breach of fiduciary duty are also not ripe. Ms. Axtell's Trust provides for the establishment of a stock ranch on a second piece of real estate. *App. A1*. Then, as funds became available, the stock ranch could be developed into a boarding ranch for children between the ages of five and twelve to learn about farm life. *App. A1*. The class plaintiffs have adduced no evidence demonstrating that there are funds available to develop a stock ranch, much less a boarding ranch. The Trust does not specify the source of such funds but the only possible source would be the income currently being paid to

the life beneficiary. Therefore, the class plaintiffs' claims based on the failure to establish a stock ranch are not ripe and the circuit court abused its discretion in granting them class action status to bring unripe claims. The writ is appropriate.

III.

Relator is entitled to an order prohibiting Respondent from certifying the class and proceeding to hear the case as a class action and directing him to dismiss the class plaintiffs because they cannot satisfy the class certification requirements of Rule 52.08 in that the class plaintiffs can neither adequately protect the interests of the entire class, nor satisfy the requirement of typicality.

For a case to be certified as a class action, all of the requirements of Rule 52.08 must be met, which plaintiffs here did not do, and under these circumstances probably cannot ever do. *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 410 (Mo. App. W.D. 2000).

One or more members of a class may sue on behalf of all members only if (1) the class is so numerous that joinder of all would be impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representatives are typical of all members of the class, and (4) the representatives will fairly and adequately protect the interests of the entire class. Mo.R.Civ.P. 52.08(a). The action may be maintained as a class action if all the requirements under 52.08(a) are met and (1) the prosecution of separate actions would create (A) the risk of inconsistent adjudications or

(B) adjudications with respect to individuals that would be dispositive of the interests of non-participating members not party to the litigation or would impede their ability to protect themselves; or (2) a party opposing the class has acted or refused to act on some basis applicable to the whole class such that declaratory relief is appropriate; or (3) the court finds that questions of law or fact common to the class predominate over those affecting individuals and thus class action is the superior method by which to adjudicate. Mo.R.Civ.P. 52.08(b).

The class plaintiffs sought class certification on a bare motion, unsupported by detailed allegations, let alone evidence as discussed in the point four, *see infra*. However, the motion was also fatally flawed in the legal sense in at least two respects.

A. Class plaintiffs cannot adequately protect the interests of the entire class.

Class plaintiffs did not show that their claims are representative of all the potential beneficiaries, nor did they show that they can adequately protect the interests of the other members. In fact, the claims of the named plaintiffs may actually be adverse to the other members of the class. The benefits they seek under the Trust are only available if there are funds available. They have not shown that any funds are available. Even if the class plaintiffs could show that some funds are available, they are not unlimited. The children, in essence, would be vying against one another to be able to benefit from the boarding ranch or scholarship money. Thus, class plaintiffs cannot protect the interests of the entire class.

B. Class plaintiffs cannot satisfy the typicality requirement.

As a prerequisite to the requirement of typicality, the named plaintiffs must have the legal standing to litigate the claims on behalf of the class. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 (1976). As was demonstrated above, the purported class has no standing to bring their claims. Only the Attorney General can protect the public's interest in charitable trusts. *Voelker*, 359 S.W.2d at 695. Plaintiffs can bring their claims on behalf of a class only if they establish an interest in the charitable trust that is distinct from and conflicts with the interest of the public. Class plaintiffs have failed to establish such an interest. Class certification is merely a back-door attempt to avoid the standing issue. Therefore, without standing, the class plaintiffs cannot satisfy the requirement of typicality.

Although the trial court does have discretion as to whether the case should proceed as a class action, the requirements of Rule 52.08 are mandatory. *Beatty v. Metropolitan St. Louis Sewer District*, 914 S.W.2d 791, 795 (Mo. 1995). Class plaintiffs cannot meet at least two of the requirements of Rule 52.08. When the court certified the plaintiffs as a class and allowed them to proceed, the court acted outside of its jurisdiction. This was a clear abuse of discretion and illustrates a lack of careful consideration. A writ is appropriate.

IV.

Relator is entitled to an order prohibiting Respondent from certifying the class and proceeding to hear the case as a class action and directing him to dismiss the claims of class plaintiffs because the class plaintiffs did not meet their burden of producing significant and persuasive evidence that showed class certification was proper in that class plaintiffs failed to produce more than “sketchy and conclusory” allegations that merely reiterated the rule.

The plaintiff has the burden of proving that class certification is appropriate. *Trotter v. Klinicar*, 748 F.2d. 1177, 1184 (7th Cir. 1984). Here, class plaintiffs failed to satisfy their burden. Although the court is not required to hold an evidentiary hearing on the matter, plaintiffs must present “significant and persuasive evidence” that class certification is appropriate. *Murray et al v. Rent-A-Center Inc.*, 2001 U.S. Dist. LEXIS 19339 at *6 (W.D.Mo., May 11, 2001). The class plaintiffs failed to produce significant and persuasive evidence. In fact, they failed to present any evidence. Class certification was granted solely on the basis of plaintiff’s “sketchy and conclusory” allegations that merely reiterated the language of the rule. *Trotter*, 748 F.2d. at 1185. Such allegations are insufficient. *Id.*

Once the significant and persuasive evidence in support of class certification is presented, the court should “subject that evidence to a ‘rigorous analysis’ before determining whether the plaintiffs have met their burden of demonstrating the propriety of class action.” *Murray*, 2001 U.S. Dist. LEXIS 19339 at *5. Again, class plaintiffs

failed to present any evidence on class certification, thus the court could not have conducted a rigorous analysis. Therefore, the order certifying the class was improper and the writ is appropriate.

CONCLUSION

Based on the foregoing, the permanent writ should be issued.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 4,673 words, excluding cover, this certification, signature block and appendix, as determined by WordPerfect 9 software;

2. That the attached brief includes all the information required by Supreme Court Rule 55.03;

3. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

4. That two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 24th day of October, 2002, to:

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