The State of New Hampshire

Supreme Court

Docket No. 2017-0295

Appeal of James Cole

New Hampshire Department of Information Technology's Supplemental Memorandum

On April 5, 2018, this Court requested the parties submit memorandum addressing the applicability of *Atwater v. Town of Plainfield*, 156 N.H. 265 (2007). Pursuant to that order, Appellee New Hampshire Department of Information Technology ("DOIT") submits this brief memorandum.

As noted in the Court's order, *Atwater* concerned an appealing party who timely appealed, but named the wrong defendant. *Atwater*, 156 N.H. at 266. The appellant named the site-plan applicant as a defendant in a planning-board appeal instead of the municipality. *Id.* After looking to the statutory scheme at issue, this Court held that "the plaintiffs' filing of the appeal within thirty days of the planning board's vote on the . . . application established jurisdiction." *Id.* at 268. Thus, *Atwater* involved a timely appeal by persons whose standing to appeal was not in question.

In contrast, here, there is no timely appellant with standing, which deprives this Court of subject-matter jurisdiction. *See Duncan v. State*, 166 N.H. 630, 640 (2014) ("[S]tanding is a question of subject matter jurisdiction . . . ."); *see also In the Matter of Ball & Ball*, 168 N.H. 133, 140 (2015) ("Subject matter jurisdiction constitutes a tribunal's authority to adjudicate the type of controversy involved in the action." (quotation omitted)). The State Employees' Association ("SEA") was the only one that appealed within the time limit set by RSA 541:6. However, despite ample opportunity, SEA has never disputed DOIT's claim that SEA lacked

standing to file an appeal. *See generally* Pet.'s Mot. to Amend Pet.; Pet.'s Obj./Resp. to State's Mot. to Dismiss/Mot. for Summ. Affirm.; Pet.'s br.; Pet.'s reply br.

Thus, unlike *Atwater*, this case presents an issue in which the only timely appealing party has no standing.[1] Because SEA lacked standing to appeal, its appeal petition had no legal effect and appellate subject-matter jurisdiction never vested in this Court. *See Texas Quarter Horse Assn. v. Am. Legion of Dep't of Tex.*, 496 S.W.3d 175, 183-84 (Tex. App. 2016) ("[A]n appeal brought by an appellant lacking standing is the legal equivalent of no appeal having been perfected at all . . . ."); *Clayton v. Fisher*, 2008 Cal. App. Unpub. LEXIS 8968, at *13 (Cal. Ct. App. Nov. 18, 2008) ("The appellate court has no jurisdiction to consider an appeal filed by an appellant with no standing."); *Seely v. Youssef*, 1995 Ohio App. LEXIS 1212, at *3-4 (Ohio Ct. App. Mar. 31, 1995) ("Due to the fact that this appeal was not properly perfected by a party who was entitled to appeal, this court lacks the jurisdiction to consider the merits of the . . . assignments of error."); *see also State v. P.*, 367 So. 2d 1045, 1052-53 (Fl. Dist. Ct. App. 1979) (holding that, because the only party who filed a timely challenge to the validity of an administrative rule did not have standing, "that filing was a nullity [and] [t]here was therefore no validly existing proceeding to which other persons . . . could become parties or intervenors."). In this way, SEA's appeal is more analogous to a situation in which a plaintiff who does not have standing initiates a lawsuit, which equally has no legal effect. *See Kocher v. Campbell*, 712 S.E.2d 477, 480 (Va. 2011) ("[A]n action filed by a party who lacks standing is a legal nullity."); *Cadle Co. v. Shabani*, 4 So. 3d 460, 463 (Ala. 2008) ("The jurisdictional defect resulting from

[1] To the extent that Cole now argues that "the intent of the appeal shows that Mr. Cole was in fact the appellant the whole time," Pet. reply br. at 4, DOIT disputes that unsupported interpretation of the appeal document. Courts interpret pleadings as a matter of law. *See Presidential Vill., v. Phillips*, 158 A.3d 772, 784 n.15 (Conn. 2017) ("The interpretation of pleadings is always a question of law for the court . . . ." (quotation omitted)); *Monteith v. Harby*, 3 S.E.2d 250, 250 (S.C. 1939) ("The construction of a pleading involves a matter of law."). As recounted in DOIT's brief, SEA repeatedly refers to itself as the appealing party, never Cole, therefore, Cole's assertion that he was always the appellant is belied by the plain language of the petition.

the plaintiff's lack of standing cannot be cured by amending the complaint to add a party having standing."); *Bibbs v. Cmty. Bank of Benton*, 289 S.W.3d 393, 398 (Ark. 2008) ("This court has held that a complaint filed by a party without standing in a wrongful-death action is a nullity.").

Accordingly, when SEA filed its appeal, it had the legal effect of nothing being filed at all. Therefore, in contrast to *Atwater*, when SEA filed its motion to amend to add James Cole, there was nothing to which Cole could be added. Alternatively, if this Court construes the motion to add Cole as Cole's petition to appeal, it is untimely. *See* RSA 541:6. Either way, this Court lacks jurisdiction to adjudicate the merits of this appeal.

Respectfully submitted,

New Hampshire Department of Information Technology

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Certification

I certify that a copy of the foregoing was sent on April 20, 2018, via U.S. Mail, to:

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