COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2009-SC-000043-MR

COMMONWEALTH OF KENTUCKY,
EX REL. J. MICHAEL BROWN,
SECRETARY, JUSTICE AND
PUBLIC SAFETY CABINET **APPELLANTS**

V.

INTERACTIVE MEDIA ENTERTAINMENT &
GAMING ASSOCIATION, INC., *et al.* **APPELLEES**

ON APPEAL FROM
COURT OF APPEALS
ORIGINAL ACTION NOS. 2008-CA-002019; 2008-CA-002000
2008-CA-002036

ORIGINAL ACTIONS ARISING FROM
FRANKLIN CIRCUIT COURT, DIVISION II
CIVIL ACTION NO. 08-CI-1049
HONORABLE THOMAS D. WINGATE, JUDGE

BRIEF FOR playersonly.com, sportsbook.com, sportsinteraction.com, mysportsbook.com, linesmaker.com, APPELLEES

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STATEMENT CONCERNING ORAL ARGUMENT

The appellees believe an oral argument would assist the court in deciding the issues presented. The unusual way in which appellants have prosecuted this action can be better defined through oral argument coupled with consideration of the briefs.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTER STATEMENT OF THE CASE

The appellees[1] disagree with appellants' statement that there was an investigation into illegal gambling by the Commonwealth. The truth is that the Justice Cabinet of the Commonwealth of Kentucky employed private attorneys who used retired police officers to put together a program for consideration by the Judge of the Franklin Circuit Court. Neither the Attorney General, the Commonwealth's chief law enforcement officer, nor the Kentucky State Police, the Commonwealth's principal investigative agency, were involved in any investigation about illegal Internet gambling in Kentucky.

In this case the Secretary of the Justice and Public Safety Cabinet, on relation of the Commonwealth of Kentucky, sued 141 domain names in the Franklin Circuit Court by the filing of a complaint, which was withdrawn, followed by an amended complaint.[2] The filing of the action was never completed because no summons or warning order was ever issued. CR 3.01 states: " A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order in good faith." CR 4.01 requires the clerk to "forthwith issue the required summons" and do other things at the direction of the initiating party. The requirements CR 3.01 and 4.01 were never complied with in this proceeding. The defendants named in the complaint remained in the dark.

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1 playersonly.com, sportsbook.com, sportsinteraction.com, mysportsbook.com, and linesmaker.com.

2 The pleading is designated as a second amended complaint. Appellees are unaware of a first amended complaint.

Although appellants in their brief say the action was filed on August 26, 2008, the second amended complaint has a filed stamp of September 18, 2008. On the same day that the second amended complaint was file stamped, the appellants' lawyers and witnesses came before the Judge and offered testimony and exhibits. None of the appellees were present. No notice of a hearing before Judge Wingate was given to appellees. There had been no summons served on them, nor notice by warning order, since neither summons or warning order were issued. There was no cross examination of witnesses.

Appellees disagree that "overwhelming" evidence supporting the complaint was presented to the Court. Appellees have always contended that no civil action was ever commenced and that there was a total denial of due process in entering the Court Order seizing the domain names without notice and hearing.

The Appellees first found out about the seizure order being issued by the Court when registrars received emails from the appellants about the seizures. Registrars then contacted appellees to find out what had taken place. Appellees, along with representatives of some of the other 141 domain names, participated in two hearings before the Circuit Court seeking to have the seizure order vacated and the complaint dismissed. The two principal issues raised by appellees were (1) the Court lacked jurisdiction over the res and subject matter jurisdiction over the putative civil *in rem* action, and (2) the statutory language on which the appellant predicated the Court's jurisdiction (KRS 528.100 and 500.090) did not authorize seizure and forfeiture of Internet domain names as "gambling devices."

Judge Wingate ruled that appellees' motion to dismiss should be denied and that the case should proceed to the forfeiture stage. Appellees and others affected by the Court's

ruling filed original proceedings with the Court of Appeals seeking writs of prohibition pursuant to CR 76.36(1). The Court of Appeals entered an order granting the petition for writs, holding there was an absence of subject matter jurisdiction in that domain names were not gambling devices as defined by statute. Judge Taylor in a concurring opinion found that even if domain names were gambling devices, without a criminal conviction there could be no forfeiture because KRS 528 did not provide for civil *in rem* proceedings. Judge Caperton dissented but limited his dissent to the issue addressed by the majority: whether domain names are gambling devices under the statute. The appellants filed a notice of appeal to the Supreme Court of Kentucky.

The following information about domain names may be helpful.

A domain name is a roadmap to a website. *1-1 McGrady on Domain Names § 1.03.* Each website found on the Internet has a "real" address. This "real address" is actually a series of numbers and periods. If an Internet user types this numeric string, called an Internet Protocol or "IP" address, into the search field of an Internet browser program, he or she will reach the publisher's website. So, in theory, if the average person could remember such numeric strings with ease, there would be no need for domain names. In practice, however, not many of us can easily recall such designations upon demand. As a result, a "nicknaming" system, the domain name procedure, has emerged. By translating numeric addresses to alphabetical nicknames, domain names allow Internet users to identify and visit websites more conveniently. *Id.*

The three critical parties to the creation of a domain name are the registrant, registrar, and registry. *See 1-1 McGrady on Domain Names § 1.09.* When a party, the registrant,

desires to register a domain name, he or she may do so through any accredited registrar. Generally, this is done by submitting an electronic registration application at a registrar's online website. The applicant, or registrant, first chooses one of the Top Level Domains (TLDs), such as ".com," offered by the registrar, and then creates an accompanying second-level Domain (SLD) name, such as "amazon," thereby fashioning the potential domain name of "amazon.com." The registrant then submits the name electronically to the registrar for approval.

A domain name is created when the registrar registers it with the appropriate registry. *Id.; see also Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.*, 464 F.Supp. 2d 948, 951-53 (N.D. Cal. 2006).

A registry maintains the definitive database that associates the registered domain name with its proper IP number for its respective domain name server. A registrant can register a domain name only through a company that serves as a registrar for second level domain ("SLD") names. Registrars accept registrations for new or expiring domain names, connect to the appropriate registry operator's TLD servers to determine whether the name is available, and register available domain names on behalf of registrants. *Id.* Once a registrar accepts a domain name application, it will for a fee, also have the name registered in the Registry's WHOIS database. *McGrady at § 1.09.*

In summary, the registrant of <amazon.com> is Amazon.com. Inc. The registrant has registered the domain name through its selected registrar, Network Solutions. Network Solutions, in turn, has registered the domain name with the <.com> registry, VeriSign, Inc. Only when all three parties cooperate can a domain name be formed.

ARGUMENT

1. A DOMAIN NAME IS NOT A GAMBLING DEVICE AS DEFINED IN THE KENTUCKY REVISED STATUTES.

The Court of Appeals of Kentucky based its decision on statutory construction. The statute in question, KRS 528.010(4) was enacted by the General Assembly and became effective as a part of the Kentucky Penal Code on January 1, 1975. Subsection (4) defines "gambling device" as:

> "(a) Any so-called slot machine or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and which when operated may deliver, as a result of the application of an element of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
>
> (b) Any other machine or any mechanical or other device, including but not limited to roulette wheels, gambling tables and similar devices, designed and manufactured primarily for use in connection with gambling and which when operated may deliver, as the result of the application of an element of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property;"

The Court of Appeals stated " . . . it stretches credulity to conclude that a series of numbers, or Internet address, can be said to constitute a 'machine or any mechanical or other device . . . designed and manufactured primarily for use in connection with gambling.'" Order Granting Petition, p. 8. Internet addresses, which many people have, serve a myriad of purposes.

The Court went on to say that the General Assembly had not seen fit to amend KRS 528.010(4) so as to bring domain names within the definition of gambling devices, citing J.N.R. v. O'Reilly, 264 S.W.3d 587 (Ky. 2008) for recognition of the fact that it is the General Assembly's duty to define public policy, rather than the court's. Judge Thomas, in Western & Southern Life Ins. Co. v. Weber, 209 S.W. 716, 718 (1919) said:

> "The judiciary is but one of the three components of our form of government. Its duty is to interpret and construe laws, not to enact them, and if a plainly warranted construction of a statute should result in a failure to accomplish in the fullest measure that which the Legislature had in view, the remedy is legislative action, and not judicial construction."

If the Legislature has not kept up with the times through amendment of the law it can be presumed that it has chosen not to do so.

It would be in violation of Section 27 of the Kentucky Constitution for a court to exercise legislative powers.

2. A DOMAIN NAME MAY NOT BE FORFEITED IN A CIVIL *IN REM* ACTION UNDER KRS 528.100.

Prior to the enactment of KRS Chapter 528 of the penal code, Kentucky had statutory language defining gambling in Chapter 436. When drafting Chapter 528, the Legislature was well aware of Chapter 436. Judge Taylor, in his concurring opinion, pointed out the differences in KRS 436.280, now repealed, and KRS 528.100, the current statute. KRS 436.280 allowed forfeiture of gambling devices (1) upon conviction of any person using the gaming device as prohibited by statute, or (2) upon a finding of a jury that the device was used for gaming. Appellants cite Sterling Novelty Co. v. Com., 271 S.W.2d 366 (Ky. 1954)

in support of its argument that a civil *in rem* forfeiture is appropriate in this case. However, it was only after a finding by the jury under KRS 436.280 that slot machines were forfeited in Sterling Novelty. Nowhere in KRS Chapters 528 and 500 is a civil *in rem* forfeiture action authorized.

3. THE APPELLANTS LACK STANDING TO PROSECUTE THIS ACTION.

Appellants have devoted a substantial part of their brief to the matter of standing. It is the appellants who lack standing to prosecute this action. Appellants are seeking to prosecute a civil *in rem* action using KRS Chapters 528 and 500, which are a part of the Penal Code. It is the Attorney General of the Commonwealth of Kentucky who is the ". . . chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies and political subdivisions . . ." KRS 15.020. KRS Chapter 15 is clear in setting out the legislative intent of vesting the Attorney General and Commonwealth and County Attorneys with sole authority for the enforcement of the criminal laws of Kentucky. The criminal laws of Kentucky are set out in the penal code. Chapter 15A of the Kentucky Revised Statutes creates the Justice and Public Safety Cabinet. No where is the Cabinet authorized to enforce penal statutes or contract with private attorneys to prosecute actions under penal statutes. Appellants lack authority to prosecute this action. Moreover, the appellants' attempt to enforce criminal laws in this case is contrary to Section 28 of the Kentucky Constitution. That Section reads as follows:

> "No person or collection of persons, being of one of those departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

The Court of Appeals, when previously Kentucky's highest court, said "Section 28 seems merely to prohibit one department from grabbing power that properly belongs to another . . ." Commonwealth, ex rel. v. Associated Industries of Kentucky, 370 S.W.2d 584, 586 (Ky. 1963). Here the Justice Cabinet is seeking to grab the power belonging to the Attorney General who has not brought any action against the appellees. Despite this lack of authority, appellants proceeded with this action. The complaint was filed but no summons or warning order was issued, making it an unusual and unauthorized proceeding from the beginning. Then appellants claim the Circuit Court held a "probable cause" hearing (without notice). It is interesting that appellants use the term probable cause which is usually associated with constitutional and due process rights in criminal cases, but completely ignore those due process and constitutional rights in this matter. Such arbitrary action is prohibited by the Fourteenth Amendment to Constitution of the United States and Sections 1, 2, 10 and 11 to the Kentucky Constitution.

Appellants also ignored the rules of civil procedure when filing the action. CR 3.01 under the heading "Commencement of Action" reads:

> "A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith."

The Kentucky rule differs from the federal rule where the action is commenced upon filing of the complaint. Federal Rule of Civil Procedure 3. The drafters of the Kentucky Rules of Civil Procedure elected to follow the law as previously written under statute, Ky. Stat. §2524, and required a summons or warning order to be issued in good faith in order for a civil action to be commenced. The case law is clear that the action is not commenced until

the summons or warning order is issued in good faith. Gibson v. EPI Corp., 940 S.W.2d 912 (Ky. App. 1997).

Thus, according to the civil rules and case law appellants should not be allowed to proceed with this case. This issue was raised by appellees in the trial court and with the Court of Appeals.

4. APPELLANTS' STANDING ARGUMENT IS WITHOUT MERIT.

The appellants' argument about appellees standing to defend presupposes that appellants have a right to enforce criminal statutes, ignore the civil rules, deny due process rights of notice and hearing to appellees prosecuted as defendants in the suit, interfere with their property rights and then deny defendants, appellees here, the right to defend. It is the appellants who chose to sue the domain names and it is the domain names which are responding.

In attempting to deny standing to the domain name defendants, the appellants cited KRS 500.090, which states in part that:

> "(4) The trial court shall remit the forfeiture of property when the law claimant:
>
> (a) Asserts his or her claim before the disposition of the property pursuant to this section;
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> (b) Establishes his or her legal interest in the property; and
>
> (c) Establishes that the unlawful use of the property was without his or her knowledge and consent. . . .

(5) For purposes of this section, "lawful claimant" means owner or lienholder of record."

The appellants assert that under this provision, only a "lawful claimant," the "owner or lien holder of record," has standing to contest forfeiture. The appellants misconstrue the statute. This provision does not involve the determination of whether property is subject to forfeiture, but whether a trial court should remit forfeiture after a determination of unlawful use has been made in a criminal proceeding. Under the statute, the trial court can remit forfeiture only if the owner or lien holder of record can establish that the unlawful use of the property was without the claimant's knowledge and consent. This presupposes that the trial court in a criminal proceeding found unlawful use of the property and establishes an *innocent owner* claim for remission of the resulting forfeiture. In the case before the court, there was no finding of unlawful use in a criminal proceeding. Appellants are attempting to use a civil proceeding to enforce a criminal statute without affording appellees due process of law.

The cases cited by appellants on the standing argument are cases where legal determinations of criminal conduct had been made in due process proceedings. That is not the case here. There has not been a finding in a criminal proceeding that any defendant-appellee has committed any crime. Appellants claim on nearly every page of their brief that crimes have been committed but as of this date there have been no convictions for criminal conduct nor even an indictment. Further, as set out above, the proceeding undertaken by appellants is contrary to law and without justification or jurisdiction. Seizure and forfeiture should never be allowed where there is a deliberate disregard of due process rights.

5. THE CIRCUIT COURT LACKS JURISDICTION OVER THE DOMAIN NAMES.

Domain names do not constitute "property" which could provide a court with *in rem* jurisdiction. *In rem* actions in Kentucky typically involve tangible property. Because this is a case of first impression in Kentucky it is necessary to look to other jurisdictions for guidance.

In Network Solutions, Inc. v. Umbro Int'l., Inc., 259 Va. 759, 770-71, 529 S.E.2d 80, 86-7 (2000), the Virginia Supreme Court held that a domain name registration created a contract for services, not an intangible property right. Likewise, in BASF Agrochemical Prods. v. Unkel, No. 05 CV 1478, 2006 WL 3533133, at 7 (W.D. La. Dec. 7, 2006), the court rejected an opinion of the 9th Circuit Court and held that domain names are not property.

Moreover, even if the court found domain names to constitute property, neither the domain names, the entities to which they are registered, nor the businesses that own the domain names are located in Kentucky.

State courts have no *in rem* jurisdiction over property beyond their borders. Hanson v. Denckla, 357 U.S. 235, 246 (1958). Shaffer v. Heitner, 433 U.S. 186 (1977), an opinion misunderstood by appellant, holds that the situs of property within the territorial boundaries of the court may not by itself always be sufficient to invoke *in rem* jurisdiction. Shaffer did eliminate the Hanson situs requirement, but added the minimum contacts analysis used to evaluate *in personam* jurisdiction as an additional requirement. See Shaffer at 205-12.

6. THE ORDER OF THE COURT OF APPEALS SHOULD BE AFFIRMED.

The order granting appellees a writ of prohibition should be affirmed and the court should dissolve the Franklin Circuit Court's seizure order, which the appellants have advised the registrars still remains in effect. The Franklin Circuit Court acted and was threatening to further act without jurisdiction. The Secretary of Justice had no statutory authority to attempt to enforce a criminal statute in a proceeding designated as a civil *in rem* action. The Court lacks jurisdiction because a civil action was never commenced as required by CR 3.01. See W.G.H. v. Cab. for Human Resources, 708 S.W.2d 109 (Ky. App. 1986). The Court proceeded outside of its jurisdiction when it denied due process to those designated by the Secretary as defendants. The Court has no authority to extend the statutory definition of "gambling devices" to include domain names. The Court took action against parties not located in Kentucky who were never brought before the Court by summons or warning order.

CONCLUSION

The Order of the Court of Appeals should be affirmed and the action in the Franklin Circuit Court should be dismissed.

Respectfully submitted,

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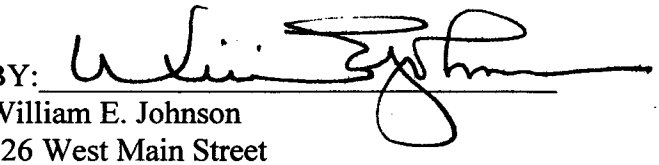
BY: 

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