

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL., RON CALZONE,)	
Respondent,)	
)	Case No. _____
vs.)	
)	
MISSOURI ETHICS COMMISSION,)	
Appellant.)	
_____)	

RESPONDENT’S APPLICATION FOR TRANSFER

QUESTIONS OF GENERAL INTEREST AND LAW REQUIRING REEXAMINATION

1. When an administrative agency clearly acts without subject-matter jurisdiction, are the circuit courts prohibited from issuing writs of prohibition forestalling further unlawful proceedings?

2. Prohibition exists to remedy improper exercises of jurisdiction. This Court long ago stated that an appeal is not an adequate remedy in such cases because an “appeal would not prevent the expense, vexation and annoyance” of continued proceedings. *Dahlberg v. Fisse*, 328 Mo. 213, 224 (Mo. 1931). Does that principle also apply to administrative agencies?

SUGGESTIONS IN SUPPORT OF APPLICATION FOR TRANSFER

A party in a civil action may seek transfer to the Missouri Supreme Court where the case is of general interest or importance, necessitates the re-examination of existing case law, or directly conflicts with a case in another appellate district. This case presents the first two grounds.

STATEMENT OF FACTS

The Missouri Ethics Commission (“Ethics Commission” or “MEC”) and the Administrative Hearing Commission (“Hearing Commission” or “AHC”) have limited jurisdiction to review and adjudicate ethics complaints.¹ Both commissions are vested with subject-matter jurisdiction upon receipt of a complaint “filed *only* by a natural person.” § 105.957(2), RSMo (emphasis supplied).

This case originates from an ethics complaint filed not by a natural person, but instead by a corporation: the Missouri Society of Governmental Consultants. The Society held a board vote, hired counsel to file the complaint, and dictated when it would be filed. Even the Society’s lawyer, on the face of the complaint itself, described it as having been filed “on behalf of [his firm’s] client, Missouri Society of Governmental Consultants.”

Respondent’s counsel noted the Ethics Commission’s lack of jurisdiction at a hearing held before that body, but it nevertheless found probable cause without addressing the argument. Mr. Calzone appealed to the AHC and filed a motion for judgment on the pleadings, continuing to press his claim that subject-matter jurisdiction was absent. At the hearing on that motion, the AHC Commissioner twice agreed that there was no jurisdiction. Yet he never formally ruled on the matter, and instead permitted the Ethics Commission to

¹ *Bauer v. Mo. Ethics Comm’n* (Mo. Admin. Hearings 2008) (“The conditions for Ethics’ jurisdiction, and therefore [the Administrative Hearing Commission’s] jurisdiction, include ‘a complaint as described by section 105.957’”) (quoting § 105.

961(1), RSMo.).

amend its answer and initiate wide-ranging discovery having nothing to do with the agencies' plain lack of jurisdiction.

Having exhausted his procedural options for obtaining a jurisdictional ruling from the AHC, and facing the prospect of long, invasive, and expensive proceedings before a tribunal with no authority over him, Mr. Calzone turned to the Cole County Circuit Court. There, he sought and received preliminary and permanent writs of prohibition. While the Ethics Commission maintained that it had subject-matter jurisdiction because the corporation's attorney was a human being, even if the corporation itself was not, Circuit Judge Jon Beetem noted that this argument "just defies at least my experience of the law." The Circuit Court explicitly found as matters of fact that the Society had filed the complaint and that its attorney was acting as its agent, and drew the legal conclusion that the AHC consequently lacked subject-matter jurisdiction.

Although a circuit courts' decision to issue a writ of prohibition is reviewed for abuse of discretion, the Court of Appeals reversed. It did not dispute the Circuit Court's jurisdictional ruling. Instead, it found that the writ could not issue because Mr. Calzone ought to have waited until the conclusion of the AHC's proceedings before seeking review.

Mr. Calzone asked for reconsideration of that ruling, or transfer to this Court, noting that the Court of Appeals' decision categorically stripped the circuit courts of discretion to issue writs of prohibition to the AHC—even "where the lack of jurisdiction is obvious, the cost to the parties concrete, and the administrative body has ignored numerous attempts to obtain a jurisdictional ruling." The motion for reconsideration or transfer was denied.

QUESTIONS OF LAW WARRANTING REVIEW

1. The first important question of law the appellate decision raises is whether the circuit courts have discretion to issue writs of prohibition to Missouri's administrative agencies. The Court of Appeals held that a circuit court abuses its discretion if it grants prohibition before agency proceedings reach the point of a final appeal on the merits. This is a matter of great general interest and importance because it forces litigants to bear whatever difficulties and expense an agency might impose upon them, no matter how glaring its lack of jurisdiction may be.

Prohibition is an ancient remedy, available in the rare situation where proceedings must be immediately halted because a tribunal clearly acts without jurisdiction. William Blackstone, Commentaries on the Laws of England, Book III at 112-114.² "The power of issuing the writ was habitually exercised by the principal courts of common law in England," and migrated to the American colonies (and later the Union and its several states) along with other essential aspects of the English system of ordered liberty. *Conn. R.R. Co. v. Cnty. Comm'rs of Franklin*, 127 Mass. 50, 58 (Mass. 1879).³

² Available online at: http://avalon.law.yale.edu/18th_century/blackstone_bk3ch7.asp.

³ As one text has put it: "The purpose of prohibition is to shut off the necessity of going through a hearing, a trial, before a tribunal that has no power to deal with the subject matter at all...it exactly fits the bill if the tribunal can in no circumstances whatsoever act validly as to the subject matter involved in the hearings it proposes to conduct." Gellhorn & Byse, *Administrative Law* 138 (1970).

In Missouri, the authority to issue writs of prohibition has been entrusted to the sound discretion of the circuit courts. *State ex rel. St. Louis Housing Auth. v. Gaertner*, 695 S.W.2d 460, 461 (Mo. banc 1985). Here, the Circuit Court exercised that discretion to halt proceedings premised on a fatally-flawed complaint that could not convey jurisdiction, a fact that the AHC itself acknowledged in an open hearing. *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998) (“[P]rohibition will lie...to remedy an excess of jurisdiction...”); *State ex rel. Raack v. Kohn*, 720 S.W.2d 941, 943 (Mo. banc 1986) (“Prohibition is an independent proceeding to correct or prevent proceedings that lack jurisdiction”).

That discretion was not, however, properly respected by the Court of Appeals. *State ex rel. Cass Cty. v. Mollenkamp*, 481 S.W.3d 26, 29 (Mo. App. W.D. 2015) (appellate court reviews issuance of a writ of prohibition for abuse of discretion). On appeal, the Court of Appeals ought only to have found an abuse of discretion if the Circuit Court’s decision was “clearly against the logic of the circumstances then before the court and [was] so arbitrary and unreasonable as to shock the sense of justice.” *State v. Johns*, 34 S.W.3d 93, 111 (Mo. banc 2000); *State ex rel. Wyeth v. Grady*, 262 S.W.3d 216, 226 n.11 (Mo. banc 2008) (““On appeal, in determining whether the trial court’s ruling amounted to an abuse of discretion...evidence will be viewed in a light favorable to the result of the trial court””) (quoting *Anglim v. Mo. P.R. Co.*, 832 S.W.2d 292, 303 (Mo. banc 1992); see also *Anglim*, 832 S.W.2d at 303 (“...trial court discretion is essential”). Given that the facts here unambiguously showed that a corporation, not a natural person, filed the complaint—a fact specifically found by the Circuit Court and which was fatal to the agencies’ statutory

jurisdiction—the Court of Appeals erred in finding an abuse of discretion. *Johns*, 34 S.W.3d at 111.

The Court of Appeals’ reasoning is equally troubling. It did not disagree with the Circuit Court’s determination that the MEC and AHC lacked jurisdiction to proceed. Instead, it held that Mr. Calzone “had not exhausted his administrative remedies,” and that “because an appeal was available to Calzone after exhaustion of those remedies, it was an abuse of discretion for the circuit court to issue a writ prohibiting the AHC from performing its statutorily mandated review of Calzone’s appeal of the MEC decision.” Op. at 10-11.

Put differently, the Court of Appeals believed that prohibition is unavailable, regardless of context, if an appeal can eventually be taken from the AHC’s review of agency action. But this avoids the entire point of the writ of prohibition, which is to prevent the harm inherent in continuing unlawful proceedings, and to save the parties from the indignity and expense of fruitless proceedings before a clearly-powerless tribunal.⁴ By

⁴ The Court of Appeals’ conclusion also deviates from the rule adopted by a number of Missouri’s sister states. *Spokane Cnty. v. State*, 136 Wn.2d 644, 652 (Wash. 1998) (affirming the grant of a writ of prohibition, and denying an administrative agency’s argument that a petitioner is “required to advance through all the steps of the [agency’s] administrative process prior to judicially challenging...jurisdiction”); *Akron v. Penn. Public Utility Comm’n*, 453 Pa. 554, 561 (Pa. 1973) (“It is true, however, that prohibition can be utilized to prevent the assertion by an inferior tribunal of a *clearly* erroneous claim of jurisdiction”) (emphasis in original); *Commonwealth Acting ex rel. Unified Judicial Sys.*

announcing a general rule that prohibition is unavailable, the court of appeals eliminated the writ in practice, and unilaterally extinguished the circuit courts' supervisory discretion over the actions of the AHC.

This Court ought to accept transfer to determine whether Missouri's circuit courts still retain discretion to issue writs of prohibition to the AHC, or whether administrative proceedings, once begun, must be permitted to continue in the face of a clear lack of subject-matter jurisdiction. *State ex rel. Regional Justice Info. Serv. Comm'n v. Saitz*, 798 S.W.2d 705, 706 (Mo. banc 1990) (“It is axiomatic that prohibition is an appropriate remedy for...improper exercise of jurisdiction,” and that “the issuance of the writ is in the sound discretion of [the circuit] court”) (citation and quotation marks omitted).

2. The second important question of law presented here is whether the circuit courts are barred, contrary to longstanding precedent of this Court, from issuing writs of prohibition to “prevent the expense, vexation[,] and annoyance” of extended proceedings before an adjudicative body that clearly lacks jurisdiction over the matter. *Dahlberg v. Fisse*, 328 Mo. 213, 224 (Mo. 1931); also *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 330 (Mo. banc 2009 (prohibition appropriate to “prevent unnecessary, inconvenient[,] and

v. Vartan, 557 Pa. 390 (Pa. 1999) (granting writ of prohibition, then resolving the case entirely on the merits for reasons of judicial economy); *Conn. R.R. Co.*, 127 Mass. 50, 57-58 (“A writ of prohibition issuing from the highest court of common law is the appropriate remedy to restrain a tribunal of peculiar, limited[,] or inferior jurisdiction from taking judicial cognizance of a case not within its jurisdiction”).

expensive litigation””) (quoting *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 860 (Mo. banc 2008)); *Grady*, 262 S.W.3d at 219 (prohibition may lie “to prevent an abuse of discretion, irreparable harm to a party, or an extra-jurisdictional act and may be appropriate to prevent unnecessary, inconvenient, and expensive litigation”).

By reversing the Circuit Court, the Court of Appeals has ensured that all future actions that the Administrative Hearing Commission may order below—including discovery,⁵ briefing, depositions, and a new hearing with witness testimony and cross-examination—must be undertaken, even though it is obvious every such order is *ultra vires* and would be overturned on appeal after the AHC’s proceedings finally conclude.

That conclusion contradicts this Court’s directive that “[i]f a party cannot state facts sufficient to justify court action...it is fundamentally unjust to force another to suffer the considerable expense and inconvenience of litigation.” *Bickel*, 285 S.W.3d at 330. Instead, the Court of Appeals ruled that, unless there is a statutory bar, *Op.* at 10, n.5,⁶ the parties

⁵ While the Court of Appeals ignored the issue, it was aware that the AHC has stayed its own briefing schedule on summary decision in order to permit the MEC to seek, for the first time, discovery against both Mr. Calzone and a third party, Missouri First, Inc. Mr. Calzone has already unsuccessfully sought a protective order from the Hearing Commission concerning those discovery requests. If these proceedings return to the AHC, they are likely to be extraordinarily lengthy, invasive, and costly.

⁶ Compounding the error, this decision of the Court of Appeals directly contradicts U.S. Supreme Court precedent. In 1988, the U.S. Supreme Court found that if a body “does not

must endure a sham administrative proceeding that is nothing more than “a waste to the system and an unjust expense to the parties that cannot be repaired on appeal.” *Bickel*, 285 S.W.3d at 330. This Court ought to accept transfer, so as to preserve the writ of prohibition as a tool, entrusted to the sound discretion of the circuit courts, to prevent unnecessarily costly *ultra vires* proceedings and preserve judicial economy

CONCLUSION

The instant case presents questions of general interest or importance, and requires the re-examination of existing law. Accordingly, Respondent asks this Court to accept transfer of this case, and to resolve the questions presented.

have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void.” *U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988). This case, which was briefed before both the Circuit Court and the Court of Appeals, established that adjudicative bodies *must* have jurisdiction over the case’s subject-matter before ordering unrelated discovery. The Court of Appeals declined to even address the *Catholic Conference* decision in its opinion, and this error also serves as independent grounds for transfer. U.S. Const. art. VI, cl. 2.

Respectfully submitted,



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Date: September 20, 2017

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Clerk of the Court on September 20, 2017, to be served by operation of the Court's electronic filing system on the following:

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