

IN THE SUPREME COURT OF PENNSYLVANIA

C.N., L.B., and minor child B.K.L.N.;	:	
J.A.R., E.G.M., and minor child J.G.;	:	
M.N., P.M., and minor child H.M.N.;	:	
G.C., J.J.S.J., and minor child M.S.J.;	:	
M.C., G.S.C., and minor children	:	
G.R.S.C. and N.B.T.; M.E.L., E.O.E.,	:	
and minor child J.O.E.,	:	
	:	No. 76 MM 2020
	:	
Petitioners	:	
	:	
v.	:	
	:	
	:	
Pennsylvania Department of Human	:	
Services,	:	
	:	
	:	
Respondent	:	

ANSWER TO PETITIONERS’ APPLICATION FOR EXTRAORDINARY RELIEF IN THE COURT’S KING’S BENCH JURISDICTION

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INTRODUCTION

On April 8, 2020, Petitioners filed an Application for Extraordinary Relief under this Court's King's Bench Jurisdiction ("Application"). Petitioners ask this Court to mandate that the Department of Human Services ("Department") remove Petitioners from the Berks County Residential Center ("BCRC") pursuant to 55 Pa. Code § 20.37. Section 20.37 authorizes the Department to remove residents if the Department finds that gross mismanagement of a facility like BCRC places the residents in immediate and serious danger. Petitioners allege that the 2019 Novel Coronavirus ("COVID-19") pandemic places BCRC's residents in immediate danger and that BCRC has failed to take sufficient action to protect residents. This Court should deny Petitioners' request, for two reasons.

First, this Court should not exercise its extraordinary King's Bench jurisdiction because the case does not raise an issue that affects a large segment of the state, because the case does not present an issue of the integrity of the judicial process, and because the case does not present a constitutional issue. Second, this Court should not exercise its extraordinary King's Bench authority because the Petitioners are not clearly entitled to the mandamus relief they seek.

Last, this Court should not use its extraordinary jurisdiction to hear the matter pending in the Commonwealth Court's original jurisdiction, docketed as

J.S.C v. DHS, 678 M.D. 2019, Petitioners have presented no justification for wresting that case from the Commonwealth Court.

ARGUMENT

I. This Court should not exercise its King’s Bench Jurisdiction because this case does not present an issue of statewide importance or the integrity of the judicial process, or a constitutional issue.

King’s Bench jurisdiction is an extraordinary form of relief that should be “exercised with extreme caution.” *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014). Consequently, this Court has exercised its King’s Bench authority in only three types of cases: those that present an issue of statewide importance; those that implicate the integrity of the judicial process; and those that involve an important constitutional issue. *See generally Pa. State Ass’n of County Comm’rs v. Commonwealth*, 681 A.2d 699 (Pa. 1996) (statewide importance); *Fagan v. Smith* 41 A.3d 816 (Pa. 2012) (same); *In re Bruno*, 101 A.3d 635, 677-80 (Pa. 2014) (judicial integrity); *Commonwealth v. Williams*, 129 A.3d 1199, 1207 (Pa. 2015) (constitutional issue); *Creamer v. Twelve Common Pleas Judges*, 443 Pa. 484, 281 A.2d 57, 58 (1971) (same). None of those circumstances exists here.

A. This case does not present an issue of statewide public importance because whether the facility properly addressed the pandemic does not affect a large segment of the state.

Petitioners do not present an issue of statewide public importance because disposition of the case would not affect a large segment of the Commonwealth or the Commonwealth as a whole. Rather, the matter is specific to 18 individuals.

When determining whether an issue is of public importance, this Court has routinely considered the statewide effect of the case. For example, in *Fagan*, this Court exercised its King's Bench jurisdiction to direct the Speaker of the House to issue writs of special elections when six legislative districts had vacancies. 41 A.3d 816 at 818. Otherwise, a large segment of the Commonwealth, six legislative districts, would be denied the clear right to elected representation. *Id.* at 818-819.

In *Pa. State Ass'n of County Comm'rs*, this Court likewise emphasized the statewide impact in assessing the public importance of the case, where the General Assembly failed to enact legislation which would have cured a constitutional defect related to funding Pennsylvania's courts. 681 A.2d at 701. In reaching this result, this Court found a statewide effect because the defect threatened the independence and existence of the entire judicial branch throughout the Commonwealth. *See Id.* at 702-03.

Thus, a common theme has emerged. For this Court to exercise its extraordinary King's Bench jurisdiction, the issue must be of public importance to a large segment of the Commonwealth or the Commonwealth as a whole.

In contrast, this action is brought by 18 private litigants. *See* Application at 2-3. The interests asserted by these private litigants are all personal in nature. *See Id. at 23-27* (seeking emergency removal from BCRC). BCRC placed a ban on admissions since March 18 to address the pandemic. *See* Declaration of Erin Roman, attached hereto as Exhibit "A," at ¶ 15(a). Consequently, the number of individuals entering BCRC will not increase during the pandemic.

If these litigants prevail on their claims, then the remedy would not affect a large segment of the Commonwealth. DHS recognizes the importance of the issue to the 18 individuals in BCRC. However, the allegations against BCRC, even if true, just are not enough to invoke King's Bench jurisdiction.

B. This case does not present an issue of the integrity of the judicial process because Petitioners do not allege judicial misconduct or lack of fairness in the judicial process.

The second type of case for which this Court has exercised its King's Bench jurisdiction is when the case implicates the integrity of the judicial process. This case does not do so.

The integrity of the judicial process is implicated when judicial misconduct is alleged. For example, in *Bruno*, this Court assumed King's Bench jurisdiction to

determine whether the Court of Judicial Discipline could suspend a judge due to his pending criminal charges. 101 A.3d at 685-686. Similarly, this Court exercised its King's Bench authority to issue an interim suspension to a jurist who was under investigation for improprieties. *In re Merlo*, 17 A.3d 869, 871-872 (Pa. 2011).

Here, Petitioners are not seeking to punish a member of the judiciary. Petitioners are also not claiming that they were treated unfairly by an inferior tribunal, or that the Department is attempting to infringe on the powers of the judiciary. Thus, the Petitioners have failed to demonstrate that this case affects the integrity of the judiciary in a way that would warrant that this Court exercise its extraordinary King's Bench jurisdiction.

C. This case does not present a constitutional issue and it is based on state licensing requirements.

Last, this Court has exercised its King's Bench jurisdiction when the case presents an important constitutional issue. For example, in *Williams*, Governor Wolf issued a reprieve for a prisoner sentenced to death. 129 A.3d at 1202. In that case, this Court elected to exercise its King's Bench jurisdiction to resolve a conflict between the Governor's stated constitutional powers to issue a reprieve and the sentencing authority of the judiciary. *Id.* at 1203. Moreover, in *Creamer*, this Court exercised its King's Bench jurisdiction to determine whether the

Governor's appointments to the judiciary fell within his constitutional authority.
281 A.2d at 58.

Here, Petitioners do not raise a constitutional issue. Rather, Petitioners seek an Emergency Removal Order under the Department's statutory and regulatory licensing authority.

In summary, because this matter does not present either a constitutional or a state-wide issue, and because it does not implicate the integrity of the judicial process, this Court should decline to exercise King's Bench jurisdiction.

II. Even if circumstances existed to warrant King's Bench jurisdiction, the Petitioners are not entitled to mandamus relief because they have not demonstrated a clear right to an Emergency Removal Order.

Even if Petitioners presented an issue that warranted King's Bench jurisdiction, this Court should decline to exercise jurisdiction because Petitioners are not entitled to mandamus relief. The Petitioners ask this Court to direct the Department to issue an Emergency Removal Order ("ERO") via a writ of mandamus. Mandamus requires the following: (1) a clear legal right in the petitioner, (2) a corresponding duty in the respondent, and (3) a lack of any other adequate and appropriate remedy at law. *See, e.g., Sinkiewicz v. Susquehanna County Bd. of Comm'rs*, 131 A.3d 541, 546 (Pa. Cmwlth. 2015) (citing *Crozer Chester Med. Ctr. v. Dep't of Labor & Industry*, 22 A.3d 189, 193 (Pa. 2011)). The writ of mandamus is "rarely issued and never to interfere with a public

official's exercise of discretion." *Sinkiewicz*, 131 A.3d at 546. Here, Petitioners do not have a clear right to an ERO because they have asked this Court to interfere with a public official's exercise of discretion.

The Department's regulations state that the Department may issue an ERO only if the Department "finds evidence of gross incompetence, negligence, misconduct in operating the facility or agency, or mistreatment or abuse of clients, likely to constitute an immediate and serious danger to the life or health of the clients, the Department will take immediate action to remove the clients from the facility or agency." 55 Pa. Code § 20.37. Such circumstances have not existed at the BCRC and do not exist now.

The Department recently conducted a remote inspection of BCRC commencing on March 31 and concluding on April 7. *See* Exhibit A, at ¶ 7. The remote inspection was conducted remotely because of the concern for the COVID-19 pandemic. *Id.* Prior to that time, the inspector conducted on-site inspections for at least four years. *Id.*

The March/April remote inspection included: a) a telephone interview of the Director of BCRC; b) a visual walk-through of BCRC using the mobile application Facetime; and c) a desk review of documents that DHS requested from BCRC and the United States Immigration and Customs Enforcement agency ("ICE"). *Id.* at ¶¶ 8 - 11.

The inspector specifically reviewed BCRC's procedures put in place to respond to COVID-19. *id.* at ¶¶ 15 and 16. BCRC's procedures include the following:

- a. No new admissions since March 18;
- b. Suspend all social visits;
- c. Suspend all field trips;
- d. Suspend all volunteer services;
- e. Suspend all on-site professional interviews (job and background checks);
- f. Continue and enhance the already preventative cleaning of the facility;
- g. Staff serve from the resident salad bar; residents no longer serve themselves;
- h. Change the offering of certain food items at the kitchenettes to sealed food options;
- i. Staff allowed to carry alcohol-based sanitizer on their person;
- j. Placed alcohol-based sanitizer around the building for use by residents and staff;
- k. Placed sanitizer wipes in the elevators for use by residents and staff; and
- l. For all medical transports, staff and residents wear gloves and masks into the medical facility. Only the resident who is receiving the medical procedure may go on the trip, except that one parent may accompany a child.

Id. at ¶ 15. Additionally, the medical staff amended the initial health and safety assessments for the doctor to ask the following questions:

- a. “Have you been in close contact with a person with laboratory confirmed 2019 novel coronavirus or their respiratory secretions in the past 14 days?”
- b. “Have you traveled from or through a geographic area(s) with widespread or sustained community transmission in the past 2 weeks?”

Id. at ¶ 16.

In addition to finding policies directly related to COVID-19, the inspector did not find any evidence that BCRC residents could not practice social distancing. *Id.* at ¶ 17. To the contrary, BCRC is a 96-bed facility, and every family had their own bedroom. *Id.* at ¶¶ 12 – 14. During the walk-through, the inspector observed residents practicing social distancing. *Id.* at ¶ 10.

As a result of the remote inspection, the inspector concluded that BCRC was in compliance with the Department’s licensing requirements under 55 Pa. Code Chapter 3800. *Id.* at ¶ 19. More important for purpose of addressing Petitioners’ allegations, she found no evidence of gross incompetence, negligence, misconduct in the licensee’s operation of BCRC, or mistreatment or abuse of residents, likely to constitute an immediate and serious danger to the life or health of the residents of BCRC. *Id.* at ¶ 18.

In addition to the Department’s licensure inspection findings, Petitioners’ own affidavits show that BCRC personnel took measures to mitigate the spread of COVID-19. For example, the affidavits of P.M. and G.S.C. state that BCRC

provided different hand soaps and posted two different posters about hand-washing and social distancing. *See* Petitioners' Exhibits E & F. These actions demonstrate that BCRC is taking proper steps to mitigate the spread of COVID-19 by informing its residents of the mitigation steps that the Department of Health has encouraged.

Id.

Given the findings of the remote inspection, and the facts asserted in Petitioners' own affidavits, Petitioners cannot demonstrate that they are entitled to a clear legal right to an ERO because of COVID-19. Rather, the Department's findings establish the direct opposite conclusion – BCRC is not operating its facility in a manner that constitutes an immediate and serious danger to the life or health of its residents. Consequently, even if circumstances existed for this Court to exercise its King's Bench jurisdiction, the Petitioners do not have a right to relief, and this Court should deny their petition.

III. This Court should decline to exercise its extraordinary jurisdiction to hear *J.S.C., et al. v. DHS* (678 MD 2019), docketed in the Commonwealth Court of Pennsylvania.

In passing, Petitioners ask this Court, in the alternative, to exercise its extraordinary jurisdiction to hear *J.S.C. v. DHS*, 678 M.D. 2019, a case currently pending in the Commonwealth Court of Pennsylvania. *See* Application at 30. Because Petitioners have presented no justification for wresting that case from the Commonwealth Court, this Court should not exercise its extraordinary jurisdiction

to hear that matter. Rather than developing the reasons why this Court should transfer that matter from Commonwealth Court, Petitioners' Application focuses on the current COVID-19 pandemic, not the issues in the case before Commonwealth Court. Application at 4-16. Petitioners have presented no facts or law that would suggest Commonwealth Court is ill-equipped to consider and rule on that matter. Consequently, Petitioners' request should be denied.

CONCLUSION

This Court should not exercise its King's Bench jurisdiction because this case presents no issue of statewide importance, no issue of judicial integrity, and no constitutional issue. Even if the circumstances existed to exercise the Court's King's Bench jurisdiction, the Petitioners do not have a clear right to an ERO via a writ of mandamus. As a result of its most recent inspection, the Department found that BCRC was operating consistent with regulatory requirements and that BCRC has taken steps to mitigate the spread of COVID-19. Finally, this Court should not exercise its King's Bench jurisdiction to interfere with *J.S.C. et al. v. DHS*, 678 M.D. 2019).

For these reasons, the Department respectfully requests that this Court deny Petitioners' Application.

Date: April 13, 2020

Respectfully submitted,

/s/Kenneth J. Serafin

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	:	No. 76 MM 2020
Petitioners,	:	
v.	:	
	:	
Pennsylvania Department of Human	:	
Services,	:	
	:	
Respondent.	:	

DECLARATION OF ERIN ROMAN IN SUPPORT OF
RESPONDENT’S RESPONSE TO
PETITIONERS’ APPLICATION FOR EXTRAORDINARY RELIEF UNDER
THE COURT’S KING’S BENCH PETITION

I, Erin Roman, declare the following:

1. I am a Licensing Technician for the Northeast Region of the Department of Human Services (“DHS”), Office of Children, Youth and Families.

2. As a Licensing Technician, I am responsible to, among other things, inspect Child Residential and Day Treatment Facilities to determine whether those facilities are in compliance with licensing requirements set forth at 55 Pa. Code Chapter 3800.

3. Berks County Residential Center (“BCRC”) currently operates under a license for Child Residential and Day Treatment Facilities.

4. To successfully complete inspections of Child Residential and Day Treatment Facilities, I became familiar with the licensing requirements at 55 Pa. Code Chapter 3800 and with all interpretations of and policies applying those regulations.

5. I am also familiar with the general licensing regulations that apply to all type of entities licensed by DHS, which are set forth at 55 Pa. Code Chapter 20, and all interpretations of and policies applying those regulations.

6. In addition to determining whether a licensee is in compliance with the licensing requirements, I am also charged with determining whether there is evidence of gross incompetence, negligence, or misconduct in the licensee’s operation of the facility, or mistreatment or abuse of residents, likely to constitute an immediate and serious danger to the life or health of the clients, which would support an Emergency Removal Order under 55 Pa. Code § 20.37.

7. I conducted a remote inspection of BCRC commencing on March 31, 2020 and concluding on April 7, 2020. I conducted this inspection remotely out of concern for the COVID-19 pandemic. Prior to this inspection, I personally conducted monthly onsite visits for almost four years.

8. The March/April remote inspection included: a) a telephone interview of the Director of BCRC, Diane Edwards; b) a visual walk-through of BCRC using the mobile application Facetime with Diane Edwards; and c) a desk review of documents requested by DHS from BCRC and the United States Immigration and Customs Enforcement agency (“ICE”).

9. The visual walk-through using Facetime included only open areas that I normally would inspect during an onsite inspection, including BCRC’s hallways, places of egress, playground, staff station, the living room/recreation area, and other common areas.

10. The visual walk-through did not include resident rooms or other private areas, to protect the privacy of the residents. However, I did observe residents during the walk-through, and those residents were practicing social distancing.

11. My document review included a review of the following: fire drill records; BCRC’s census report; BCRC’s admission and discharge log since my last inspection on February 25, 2020; the admission physical examination and the

initial health and safety assessments of the eight children who remained at BCRC on the date of my review; and BCRC's procedures responding to the 2019 Novel Coronavirus (COVID-19).

12. On April 7, 2020, BCRC housed thirteen (13) adults and eight (8) children.
13. Every family has their own bedroom.
14. BCRC has the capacity to house 96 individuals.
15. BCRC's procedures in response to COVID-19 include the following:
 - a. No new admissions since March 18;
 - b. Suspend all social visits;
 - c. Suspend all field trips;
 - d. Suspend all volunteer services;
 - e. Suspend all on-site professional interviews (job and background checks);
 - f. Continue and enhance the already preventative cleaning of the facility;
 - g. Staff serve from the resident salad bar; residents no longer serve themselves;
 - h. Change the offering of certain food items at the kitchenettes to sealed food options;
 - i. Staff allowed to carry alcohol-based sanitizer on their person;

- j. Placed alcohol-based sanitizer around the building for use by residents and staff;
- k. Placed sanitizer wipes in the elevators for use by residents and staff; and
- l. For all medical transports, staff and residents wear gloves and masks into the medical facility. Only the resident who is receiving the medical procedure may go on the trip, except that one parent may accompany a child.

16. In addition to BCRC's COVID-19 procedures, the medical staff, who are part of the United States Public Health Services, amended the initial health and safety assessments for the doctor to ask the following questions:

- a. "Have you been in close contact with a person with laboratory confirmed 2019 novel coronavirus or their respiratory secretions in the past 14 days?"
- b. "Have you traveled from or through a geographic area(s) with widespread or sustained community transmission in the past 2 weeks?"

17. I did not find any evidence that residents could not practice social distancing.

18. I did not find any evidence of gross incompetence, negligence, or misconduct in the licensee's operation of BCRC, or mistreatment or abuse of residents, likely to constitute an immediate and serious danger to the life or health of the residents of BCRC.

19. Based on my remote inspection, I concluded that BCRC was in compliance with DHS's licensing requirements under 55 Pa. Code Chapter 3800.

20. As of today, BCRC houses 11 adults and 7 children.

21. The statements made in this Declaration are true and correct to the best of my personal knowledge or information and belief.

22. I understand that statements made in this Declaration are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Declarant states nothing further.

Erin Roman
Erin Roman
Licensing Technician
Office of Children, Youth and Families
Department of Human Services

Date: 4/13/2020

CERTIFICATE OF SERVICE

The undersigned certifies that I caused a copy of the foregoing to be served upon the following as indicated:

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Date: April 13, 2020

/s/Kenneth J. Serafin

Kenneth J. Serafin
Matthew J. McLees
Edward G. Cherry

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: April 13, 2020

/s/Kenneth J. Serafin

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