

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 45 MAP 2022

PATRICK J. MCDONNELL, SECRETARY OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHAIRPERSON OF THE ENVIRONMENTAL QUALITY BOARD

Appellant

vs.

PENNSYLVANIA LEGISLATIVE REFERENCE BUREAU, VINCENT C. DeLIBERATO, JR., DIRECTOR OF THE LEGISLATIVE REFERENCE BUREAU, and AMY J. MENDELSON, DIRECTOR OF THE PENNSYLVANIA CODE and BULLETIN,

Appellees

SENATE PRESIDENT PRO TEMPORE JAKE CORMAN, SENATE MAJORITY LEADER KIM WARD, SENATE ENVIRONMENTAL RESOURCES AND ENERGY COMMITTEE CHAIR GENE YAW, and SENATE APPROPRIATIONS COMMITTEE CHAIR PAT BROWNE

Senate Intervenor Appellees

HOUSE SPEAKER BRYAN D. CUTLER, MAJORITY LEADER KERRY BENNINGHOFF, and CHAIR OF THE HOUSE, ERE COMMITTEE, DARYL METCALFE

House Intervenor Appellees

HOUSE INTERVENOR APPELLEES' ANSWER TO APPELLANT'S JURISDICTIONAL STATEMENT

Respectfully submitted,

POST & SCHELL, P.C.

BY: 

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Attorneys for Intervenors Speaker of the House, Bryan D. Cutler; the Majority Leader of the House, Kerry A. Benninghoff; and the Chairman of the House Environmental Resources and Energy Committee, Daryl D. Metcalfe

Date: April 13, 2022

Pursuant to Pa. R.A.P. 911, Intervenors below, Speaker of the Pennsylvania House of Representatives, Bryan D. Cutler, the Majority Leader of the House, Kerry A. Benninghoff, and the Chairman of the House Environmental Resources and Energy Committee, Daryl D. Metcalfe (“House Intervenors”), file this Answer to Appellant Patrick McDonnell’s (“Appellant”) Jurisdictional Statement. As set forth below, the Appellant has appealed an interlocutory, temporary stay order, where no Rule allows such an appeal as of right.

Appellant initiated the action below on February 3, 2022, seeking to force the publication of the Regional Greenhouse Gas Initiative Rulemaking (“RGGI Rulemaking”) by the Pennsylvania Legislative Reference Bureau (“LRB”) prior to the expiration of consideration by the General Assembly. The House Intervenors and Senate Intervenors¹ were granted leave to intervene on March 3, 2022, due to the Intervenors’ direct and substantial interest in the litigation. The House Intervenors filed Preliminary Objections, which are not yet ripe for disposition. The Senate Intervenors filed an Answer, New Matter, and Counterclaims, seeking a declaration that the RGGI Rulemaking is void *ab initio* because it is an unconstitutional violation of the separation of

¹ Senate Intervenors include Senate President Pro Tempore Jake Corman, Senate Majority Leader Kim Ward, Senate Environmental Resources and Energy Committee Chair Gene Yaw, and Senate Appropriations Committee Chair Pat Browne.

powers doctrine, is an unconstitutional *ultra vires* action, and violates the Air Pollution Control Act and the Commonwealth Documents Law.

On March 25, 2022, the Senate Intervenors filed and served an Application for a Preliminary Injunction (“Application”), requesting that the Commonwealth Court “preliminarily enjoin all government officials employed by PADEP, the LRB, and the PCB, including Petitioner and Respondents, from taking any further action to promulgate, publish, or otherwise codify the RGGI Rulemaking.” (Senate Application, p. 16). The House Intervenors joined in the relief requested. The LRB filed an Answer that did not oppose the Application on March 29. Appellant filed an Answer opposing the Application on March 30.

On April 1, the Commonwealth Court issued an Order scheduling briefing and a full hearing on the Application for May 4, 2022. On April 5, the Commonwealth Court issued an order preserving the status quo in the interim, ordering “. . . processing of the Regional Greenhouse Gas Initiative Regulation for publication in the Pennsylvania Bulletin is stayed pending further order of this Court.” (the “Stay Order”). The Commonwealth Court’s interim stay order does not expressly grant the relief sought in the Senate Intervenors’ Application, in that it does not enjoin or otherwise restrain

Appellant in any manner. Rather, the Stay Order simply pauses “processing” of the rulemaking for publication.

Appellant’s appeal is premature procedural posturing. The Commonwealth Court’s Order, temporarily staying further action until the conclusion of the May 4, 2022 Hearing, is neither a final, appealable order under Pa. R.A.P. 341 nor an appealable interlocutory order under Pa. R.A.P. 311.

A stay order is not, perforce, a preliminary injunction. Instead, “Pennsylvania courts have treated stay orders as preliminary injunctions **under limited circumstances.**” *Commonwealth v. Morris*, 771 A.2d 721, 729 (Pa. 2001) (emphasis added). To evaluate whether a stay effectively is a preliminary injunction, this Court considers the practical impact the stay has on an appellant – namely, whether it is “tantamount to a dismissal of the cause of action or amounts to a permanent denial of the relief requested. . . .” *Chestnut v. Pediatric Homecare of Am., Inc.*, 617 A.2d 347, 349 (Pa. Super. 1992) (quoting *Philco Corp. v. Sunstein*, 241 A.2d 108, 109 (Pa. 1968)). In *Chestnut v. Pediatric Homecare*, the trial court’s denial of a stay of execution effectively would have enabled the appellees to execute on a judgment, thereby foreclosing any ability for the appellant to preserve

defenses – accordingly, the stay order was tantamount to a preliminary injunction and appealable as of right. *Id.*

Here, the Stay Order is more akin to a stay of execution, such as in *Chestnut v. Pediatric Homecare*, rather than a preliminary injunction that regulates future conduct: it simply stays the processing of an irreversible act, and preserves the status quo until the parties below can fully brief the issue and the Commonwealth Court can convene the evidentiary hearing. The Stay Order does not effectively dismiss Appellant’s claims for relief, nor does it operate to grant the Senate Intervenors relief on their Counterclaims. Indeed, the Stay Order neither directs Appellant to nor restrains Appellant from doing anything; rather, the Stay Order simply pauses further action by the LRB for a short period of time until the Commonwealth Court can hear the matter, then either grant or deny the Senate Intervenors’ Application.

For these reasons, Rule 311(a)(4) does not confer appellate jurisdiction as of right.

Even if this Court construes the Commonwealth Court’s Stay Order as a preliminary injunction, this Court should affirm because the Commonwealth Court did not abuse its discretion by issuing the temporary stay until the Court could convene a hearing. Courts apply a “highly deferential standard

of review” when evaluating a preliminary injunction ruling. *Weeks v. Dep’t of Human Servs.*, 222 A.3d 722, 727 (Pa. 2019). Specifically:

[O]n appeal from the grant or denial of a preliminary injunction, we do not inquire into the merits of the controversy, but only examine the record to determine if there were any apparently reasonable grounds for the action of the court below. **Only if it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied will we interfere with the decision of the trial court.**

Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc., 828 A.2d 995, 1000 (Pa. 2003) (internal quotation omitted) (emphasis added).

With the benefit of the Senate Intervenors’ Application, Appellant’s Answer in Opposition, and the LRB’s Answer that does not oppose the Application, the Commonwealth Court reasonably concluded that the Senate Intervenors’ sufficiently demonstrated entitlement to interim relief until the Court could convene the upcoming evidentiary hearing.

For these reasons, the appeal should be quashed.

Respectfully submitted,

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Date: April 13, 2022

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Pa. R.A.P. 911, the preceding Answer contains 998 words. This word count relies on the word count of the computer program used to prepare this brief. The word count is less than the total words permitted under Pa. R.A.P. 911.

POST & SCHELL, P.C.

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BY: _____
James J. Kutz, Esquire

Date: April 13, 2022

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.

POST & SCHELL, P.C.

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BY:

James J. Kutz, Esquire

Date: April 13, 2022

CERTIFICATE OF SERVICE

I, James J. Kutz, Esquire, hereby state that I have this day caused to be served a true and correct copy of the foregoing document upon the persons and at the addresses below named via the Court's PACFile System and U.S. Mail, First-Class, postage prepaid, as follows, which satisfies the requirements of PA. R.A.P. 121 and 1514(c):

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