

In the Supreme Court of Pennsylvania

60 M.A.P. 2015 (Related to 59 M.A.P. 2015)

DAVID W. SMITH and DONALD LAMBRECHT,

v.

GOVERNOR THOMAS W. WOLF, in his official capacity
as Governor of the Commonwealth of Pennsylvania,
and COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF HUMAN SERVICES,

Appeal of : PRESIDENT PRO TEMPORE SENATOR JOSEPH B. SCARNATI, III,
MAJORITY LEADER SENATOR JAKE CORMAN,
MAJORITY WHIP SENATOR JOHN GORDNER
and MAJORITY APPROPRIATIONS CHAIRMAN SENATOR PAT BROWNE,
on behalf of the PENNSYLVANIA SENATE MAJORITY CAUCUS,
Possible Intervenors

BRIEF OF APPELLEES DAVID W. SMITH AND DONALD LAMBRECHT

Appeal from the Order of the Commonwealth Court,
entered June 3, 2015, at 177 MD 2015

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September 21, 2015

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STATEMENT OF THE CASE¹

Appellee David W. Smith (“Mr. Smith”), Petitioner below, suffers from muscular dystrophy and resulting quadriplegia and directs his own care pursuant to the Attendant Care Services Act (“Act 150”).² (R. 19a). Appellee Donald Lambrecht (“Mr. Lambrecht”), also Petitioner below, is a Direct Care Worker employed by and providing homecare to Mr. Smith for approximately 25 years. (R. 20a). For the last 25 years, Mr. Smith has been able to control the decisions regarding provision of his care working directly with Mr. Lambrecht. (R. 19a-20a). Conversely, Mr. Lambrecht has successfully and amicably negotiated the terms and conditions of his employment without the aid of a union for the entirety of their employment relationship. (R. 20a).

Under Act 150, Mr. Smith holds the sole authority to “make decisions about, direct the provision of, and control” his attendant care services including “hiring, training, managing, paying and firing of an attendant.”³ Mr. Smith and Mr. Lambrecht, in their Petition for Review, filed with the Commonwealth Court on April 6, 2015, alleged that Executive Order 2015-05 (“Executive Order”), (R. 51a-

¹ Appellees adopt and incorporate the facts set forth in Appellant’s “Statement of the Case,” and offer this counter-statement as a supplement to the facts already alleged.

² 62 P.S. §§ 3051-3058.

³ Id.

54a), would limit Mr. Smith's ability to direct his care and his status as the legal employer under the "participant-directed" model would be altered, (R. 38a); the Executive Order would limit Mr. Lambrecht's ability to negotiate the terms and conditions of his employment, and his desire to remain unrepresented would be threatened, by its implementation, (R. 38a).

On April 23, 2015, the Commonwealth Court granted Mr. Smith's and Mr. Lambrecht's Application for Emergency Relief and enjoined the executive branch from further implementing provisions of the Executive Order, pending the Commonwealth Court's consideration on the merits. (R. 11a).

On April 21, 2015, Appellants President Pro Tempore Senator Joseph B. Scarnati, III, Majority Leader Senator Jake Corman, Majority Whip Senator John Gordnor, and Majority Appropriations Chairman Senator Pat Browne, on behalf of the Pennsylvania Senate Majority Caucus (collectively, "Majority Caucus"), filed an Application for Relief Seeking Leave to Intervene as Respondent Intervenors ("Application") in the Commonwealth Court. (R. 10a). The Hon. Dan Pellegrini, President Judge of the Commonwealth Court, heard the intervention request of the Majority Caucus on May 28, 2015, and on June 3, 2015, denied the Application for lack of standing. (R. 142a-43a). The Majority Caucus filed an Emergency Application for En Banc Reargument before the Commonwealth Court on June 9,

2015, (R. 13a), which was denied by per curiam Order June 26, 2015, (R 144a), as clarified on June 30, 2015, (R. 145a).

On July 2, 2015, the Majority Caucus filed a timely appeal to this Court. (Brief of Appellants, at p. 9).

SUMMARY OF ARGUMENT

This Court should reverse the Commonwealth Court's order denying the Application filed by the Majority Caucus. The Commonwealth Court erred in denying the Application both because the Majority Caucus could have initiated their own legal action against Appellees Governor Tom Wolf ("Gov. Wolf") and the Commonwealth of Pennsylvania, Department of Human Services ("Department") and because any determination that the Executive Order is valid would trespass upon the Majority Caucus's legally enforceable interest in preserving the Constitutionally prescribed legislative authority of the General Assembly. Allowing the Majority Caucus to intervene also provides the Court with a more comprehensive view of the interests potentially damaged by the Executive Order.

Accordingly, this Court should reverse and remand to accord intervenor status to the Majority Caucus.

ARGUMENT

I. THE MAJORITY CAUCUS IS ENTITLED TO INTERVENE TO PROTECT THE EXCLUSIVE LEGISLATIVE AUTHORITY GRANTED THE GENERAL ASSEMBLY BY THE PENNSYLVANIA CONSTITUTION

The Commonwealth Court erred in denying the Majority Caucus's Application to Intervene, and this Court should reverse. The Majority Caucus's Application should have been granted under either section 3 or section 4 of Pennsylvania Rule of Civil Procedure 2327.

Rule 2327 states intervention is mandatory if, among other reasons:

- (3) such person could have joined as an original party in the action or could have been joined therein; or
- (4) the determination of such action may affect any legally enforceable interest of such person whether or not such a person may be bound by a judgment in the action.

Because the Majority Caucus could have joined as an original party challenging the validity of the Executive Order, and has a legally enforceable interest at stake in the Court's ruling, the Commonwealth Court's denial of the Application to Intervene should be reversed.

A. The Majority Caucus could have joined or been joined as an original party because the Governor’s Executive Order usurps the exclusive legislative authority granted to the General Assembly by the Pennsylvania Constitution

The Majority Caucus has legislative standing and could have joined the original case in order to challenge the Governor’s unconstitutional usurpation of legislative power.

- i. The Majority Caucus meets the requirements for legislative standing articulated by this Court in Fumo and Robinson Township.

“In seeking judicial resolution of a controversy, a party must establish as a threshold matter that he has standing to maintain the action.” Stilp v. Commonwealth, 940 A.2d 1227, 1233 (Pa. 2007). An individual seeking to establish standing based on their special status as a legislator must show there is a “discernible and palpable infringement” on their legislative authority, or assert a “diminution or deprivation” of their “power or authority” as legislators. Fumo v. City of Philadelphia, 972 A.2d 487, 501 (Pa. 2009); accord Robinson Township v. Commonwealth, 84 A.3d 1054, 1054 (Pa. 2014). Legislators are granted standing to challenge executive actions when “specific powers unique to their functions under the Constitution are diminished or interfered with.” Wilt v. Beal, 363 A.2d 876, 881 (Pa. Cmwlth. 1976).

The Pennsylvania Constitution mandates that legislative authority reside in the General Assembly exclusively and completely. The Constitution of the Commonwealth of Pennsylvania states:

The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.

Pa. Const. art. II, § 1. “The Governor’s power is to execute the laws and not to create or interpret them.” Shapp v. Butera, 348 A.2d 910, 914 (Pa. Cmwlth. 1975). Vesting the legislative power in the General Assembly works “to protect against the arbitrary exercise of unnecessary and uncontrolled discretionary power.” William Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269, 291 (Pa. 1975). “A significant purpose behind the separation of powers doctrine is to ensure that no one branch of government becomes more dominant than the others.” Seitzinger v. Commonwealth, 25 A.3d 1299, 1305 (Pa. Cmwlth. 2011), aff’d, 54 A.3d 20 (Pa. 2012).

Legislative power is defined as the power “to make, alter and repeal laws.” Bucks Cnty. Servs., Inc. v. Philadelphia Parking Auth., 104 A.3d 604, 609 (Pa. Cmwlth. 2014). While the General Assembly may delegate the power to execute or administer a law, id., the Constitution dictates “basic policy choices” must be made by the General Assembly. William Penn Parking Garage, 346 A.2d at 291. In

describing the rights and responsibilities of each branch of government, Pennsylvania courts have recognized that the three branches are “independent and co-ordinate, because distinct rights, powers and privileges are assigned to them by the Constitution. Each is entitled to the free, unbiased, uninfluenced and independent exercise of all their rights, powers and privileges in as ample extent as the Constitution allows.” Commonwealth ex rel. v. Mann, 5 W. & S. 403, 407 (Pa. 1843); accord Commonwealth ex rel. v. Mathues, 59 A. 961 (Pa. 1904).

In Fumo, this Court discussed at length the circumstances that would give rise to a finding of legislative standing—as well as those circumstances that would not. See Fumo, 972 A.2d at 501. In Fumo, six state legislators filed a petition for review with this Court in an effort to reverse a decision by the City of Philadelphia to issue a license to a casino seeking to build on submerged land. Id. The legislators raised two claims requiring separate standing arguments. Id. at 491. First, the legislators claimed that the City of Philadelphia’s grant of a submerged land license infringed on the General Assembly’s sole and exclusive statutory authority to grant a license for use of the submerged lands at issue, arguing that they had standing to protect their rights as legislators. Id. This Court agreed that standing was appropriate because the legislators sought to protect powers granted under the Pennsylvania Constitution:

The state legislators seek redress for an alleged usurpation of their authority as members of the General Assembly; aim to vindicate a power that only the General Assembly allegedly has; and ask that this Court uphold their right as legislators to cast a vote or otherwise make a decision on licensing the use of the Commonwealth's submerged lands. Thus, the claim reflects the state legislators' interest in maintaining the effectiveness of their legislative authority and their vote, and for this reason, falls within the realm of the type of claim that legislators, qua legislators, have standing to pursue.

Id. at 502.

By contrast, this Court rejected the legislators' second claim that the City did not act properly in exercising its statutory authority to license. Id. In that instance, the legislators lacked standing to bring the claim because, according to this Court, their interest amounted to little more than a disagreement with the way city leadership had interpreted and exercised their duties under the law. Unlike their argument for standing on the first claim, the legislators' argument on the second claim did not "demonstrate any interference with or diminution" in the state legislators' authority as members of the General Assembly.

Likewise, in Robinson Township, 84 A.3d at 1054, this Court clearly articulated that legislative standing is appropriate when there is a "discernible and palpable infringement" on the constitutional authority of a legislator. According to this Court, the legislators in Robinson Township did not meet this standard because

their interest in the case was merely to defend the constitutionality of, and offer evidence explaining legislative intent for, already enacted legislation. Id. at 222. This Court found that the legislators' arguments "implicate[d] neither a defense of the power or authority of their offices nor a defense of the potency of their right to vote," and therefore legislative standing was not appropriate. Id.

Here, the Majority Caucus clearly has legislative standing because they allege an infringement of the unique rights granted to them as members of the General Assembly.⁴ Like the six legislators in Fumo, the Majority Caucus "seek[s] redress for an alleged usurpation of their authority," they "aim to vindicate a power that only the General Assembly allegedly has," and they "ask that this Court uphold their right as legislators to cast a vote or otherwise make a decision." Fumo, 972 A.2d at 502; Brief of Appellants, at p. 6-23. Specifically, the Majority Caucus claims that the Executive Order represents "an unconstitutional attempt by the Governor to exercise legislative power," (R. 70a), seek to protect "the institutional power of the

⁴ (R. 70a). ("[T]he Pennsylvania Majority Caucus seeks leave to intervene in this matter . . . to protect the institutional power of the Legislature from unconstitutional encroachment by the Executive."); Brief of Appellants, at p. 9 ("Because Executive Order 2015-05 is neither authorized by the Constitution nor by statute, and therefore represents an unconstitutional attempt by the Governor to exercise legislative power, [the Majority Caucus seeks to intervene] to protect the institutional power of the Legislature from unconstitutional encroachment by the Executive.").

Legislature from unconstitutional encroachment by the Executive,” (R. 70a), claim the Governor’s action has interfered with the law-making power resting solely with the General Assembly in the Constitution, (R. 83a), and seek the Court’s help in “maintaining the effectiveness of their legislative authority and their vote.” (R. 72a). The Majority Caucus does not voice mere disagreement with the Governor as to how he is applying duly enacted law; the Majority Caucus claims the Governor has commandeered constitutional rights absolutely reserved for members of the General Assembly.⁵

The Majority Caucus’s request is also distinguishable from the legislators’ request in Robinson Township. Whereas, in Robinson Township, the legislators sought only to defend the constitutionality of a state statute and offer evidence supporting legislative intent after their duties as legislators had already been discharged, here, the Majority Caucus seeks to protect their rights as legislators to exercise sole legislative power—both in the past and in the future—against unconstitutional executive encroachment. (R. 70a-72a). Again, the Majority Caucus seeks to vindicate rights granted to them as members of the General Assembly. Instead, the Majority Caucus claims that the Executive Order seeks to

⁵ Id.

usurp power from the Executive Branch clearly intended by the Constitution to rest solely with the General Assembly. (R. 72a).

- ii. The Executive Order makes, alters, and repeals laws, actions which are the core responsibility of the General Assembly under the Constitution

The Majority Caucus could have joined or been joined as an original party to challenge the unconstitutional appropriation of their exclusive legislative authority to “make, alter and repeal laws” as members of the General Assembly. Bucks Cnty. Servs., 104 A.3d at 609. Legislative power is defined as the power “to make, alter and repeal laws.” Id.

The Executive Order makes, alters, and repeals existing law, in at least three distinct ways. First, in passing the Pennsylvania Labor Relations Act (“PLRA”) and the Pennsylvania Employee Relations Act (“PERA”), the Legislature clearly intended the law to regulate labor relations in Pennsylvania in a plenary fashion. The PLRA and PERA regulate the rights of employees to organize and bargain collectively,⁶ define who may and who may not organize in such a manner,⁷ proscribe the procedure and requirements for organizing,⁸ outline the

⁶ 43 P.S. § 211.5.

⁷ 43 P.S. § 211.3(d).

⁸ 43 P.S. § 211.7.

rights and responsibilities in the event of a labor dispute,⁹ and create the PLRB to administer the provisions of the law.¹⁰ Although the PLRA covers certain private-sector employees, it specifically excludes from coverage “any individual employed . . . in the domestic service of any person in the home of such person,” 43 P.S. § 211.3, a “reflect[ion of] the fact that the organization of household workers . . . does not further the interest of labor peace.” Harris v. Quinn, 134 S. Ct. 2618, 2640 (2014). The laws reflect carefully crafted and negotiated policy choices and are intended to be a full and complete iteration of the State’s policies regarding labor relations.¹¹

Yet the Executive Order: issues a new directive that the Commonwealth shall recognize a representative for Direct Care Workers;¹² grants Direct Care Workers the ability to organize for the purposes of collective bargaining¹³ when they are specifically prohibited from doing so under the PLRA;¹⁴ changes who may conduct

⁹ 43 P.S. § 211.6.

¹⁰ 43 P.S. § 211.4.

¹¹ See Hoffman Mining Co. v. Zoning Hearing Bd. of Adams Twp., Cambria Cnty., 32 A.3d 587, 605 (Pa. 2011) (Stating that field preemption can be inferred where analysis of the entire statute reveals the General Assembly's implicit intent to occupy the field completely); Holt’s Cigar Co., Inc. v. City of Philadelphia, 10 A.3d 902, 907-908 (Pa. 2011) (field preemption can be presumed when a statute proclaims a comprehensive course of regulation and control over an area of law).

¹² Executive Order, at ¶ 3.

¹³ Executive Order, at ¶ 1(c),(f),(i).

¹⁴ 43 P.S. § 1101.301(1).

elections and certify results from the Pennsylvania Labor Relations Board (“PLRB”)¹⁵ to the American Arbitration Association (“AAA”);¹⁶ directs the AAA to initiate an election after a showing of only 10% of Direct Care Workers¹⁷ when state and federal labor law require a showing of 30%;¹⁸ changes the entity authorized to collect signed authorization cards from the PLRB¹⁹ to the Governor or Governor’s designee;²⁰ and alters the terms of the voting process to confer exclusive representative status on an employee organization upon a showing of the “majority of votes cast in the election”²¹ when the PLRA requires a higher standard of a “majority of the employees in a unit appropriate for such purposes.”²²

Second, with respect to the regulation of direct care and direct care workers, the Executive Order invades the purview of the General Assembly, which created six different programs to serve the needs of long term home care recipients. In so doing, the General Assembly took care to detail comprehensive rules and procedures for each program covering such issues as: prerequisites for

¹⁵ 43 P.S. § 211.7(c), 43 P.S. § 1101.603(c).

¹⁶ Executive Order, at ¶ 3(a).

¹⁷ Executive Order, at ¶ 3(a)(1).

¹⁸ See 9 CFR §101.18; 43 P.S. §§211.7(c), 1101.603(a).

¹⁹ 43 P.S. §211.7(c), 43 P.S. § 1101.603(c).

²⁰ Executive Order, at ¶ 3(a)(1).

²¹ Executive Order, at ¶ 3(a)(2).

²² 43 P.S. § 211.7(a).

participation, qualifications of providers, responsibilities of providers, grievance processes, appeal processes, training, monitoring, payment processes, and reporting requirements.²³ Most importantly, the General Assembly gave to “[r]ecipients of attendant care . . . the right to make decisions about, direct the provision of and control their attendant care services. This includes, but is not limited to, hiring, training, managing, paying and firing of a[Direct Care Worker].” 62 P.S. § 3052. There is no legislative mandate contained in any of those statutes through which the Governor can claim a right to dictate the sweeping changes through Executive Order.²⁴ Nor does the Constitution afford the Executive Branch the unfettered power to decree by fiat the extensive amendments the Executive Order has made to existing law. Mr. Smith and Mr. Lambrecht are represented in this matter, but others similarly situated may not always have that opportunity. It is important to have all the stakeholders in this matter represented so that there can be comprehensive consideration of all the pertinent issues.

Third, the General Assembly’s interest goes beyond the particular encroachment represented by the Executive Order. To allow the Executive Order to stand would enhance the power of the executive branch well beyond that which

²³ See 62 P.S. §§ 101 – 1503.

²⁴ See 43 P.S. § 211; 43 P.S. § 1101; 62 P.S. §§ 101 – 1503.

is constitutionally prescribed. The Constitution articulates the rights and responsibilities of the branches of government, and provides remedies to avert the abuse of those powers, in order to prevent one branch of government exercising “uncontrolled discretionary power.” William Penn Parking Garage, 346 A.2d at 291. Unless limited by the courts, the Governor’s hubris will only serve to embolden the executive branch to further upset the balance of power by issuing more legislative directives masked as executive orders.

As a result of the Executive Order, the Governor’s trespass into the exclusive legislative rights reserved for the General Assembly is both marked and substantial. The parting words of the Executive Order—that nothing in the Order shall be construed to change existing rights and relationships—are laughable in the face of the changes to current law permeating the entirety of the Order. Were this Court to heed and apply that language, it would swallow up nearly every other directive posited in the document. Accordingly, the Majority Caucus meets the requirements to assert legislative standing and could have initiated their own suit against the Governor.

The Majority Caucus could have initiated their own case against the Governor based on an unconstitutional infringement of their legislative authority,

and therefore, this Court should reverse and remand to accord intervenor status to the Majority Caucus.

B. The Majority Caucus has a legally enforceable interest in preserving its legislative authority

In addition to the fact that the Majority Caucus could have joined as an original party, the Majority Caucus should have been permitted to intervene because it has a legally enforceable interest in preserving its legislative authority. Specifically, as members of the legislature, the Majority Caucus stands to suffer injury to its constitutional authority if the Governor's attempts to legislate through executive action are not rebuked. The Governor's actions are a direct assault on the legislators' constitutional responsibilities.

This Court's holding in Robinson Township demonstrates the broad nature of the General Assembly's legally enforceable interest for purposes of Rule 2327. In Robinson Township, members of the public challenged the constitutionality of enacted legislation called "Act 13" which provided for pre-emption of local zoning ordinances in favor of granting oil and gas producers greater drilling rights.²⁵ While acknowledging that the Attorney General is charged with defending the constitutionality of acts of the legislature, members of the General Assembly

²⁵ See Robinson Twp. v. Commonwealth, No. 284 M.D. 2012, 2012 WL 1429454, at *1 (Pa. Cmwlth. Apr. 20, 2012) aff'd sub nom, Robinson, 84 A.3d 1054.

sought to intervene because they feared the Attorney General may deem the Legislature's "intent or processes" irrelevant to the Court's review. Id. The Commonwealth Court denied intervention, finding that there was no suggestion by the legislators that "the purposes of Act 13 cannot be ascertained by the traditional methods of statutory construction." Id. This Court affirmed the Commonwealth Court's decision deeming intervention was not appropriate as the interest implicated was "neither a defense of the power or authority of their offices nor a defense of the potency of their right to vote." Robinson, 84 A.3d at 1055.

Both the facts and this Court's reasons for denying intervention in Robinson Township provide a stark contrast to the circumstances at issue in the instant case. The legislators in Robinson Township sought to intervene to argue on behalf of enacted legislation. Id. at 1054. They had already acted based on their constitutional right to legislate; they simply feared the Attorney General would not defend their actions sufficiently. In this case, however, the General Assembly's most basic constitutional functions are being commandeered. The right to determine who may organize for the purposes of a collective bargaining agreement, the percentage needed to initiate a representational vote, and the standard by which a vote will be considered successful are all matters of legislative concern. The Governor is certainly free to have opinions on these subjects and

make those opinions known to the General Assembly. However, the Governor is not free to command by executive diktat what the law will be. To allow the Governor to encroach on the Legislature's constitutional authority by letting the Executive Order stand would affect a "legally enforceable interest" of the General Assembly. As stated above, the Executive Order interferes with numerous constitutional and statutory provisions of Pennsylvania law and is plainly an attempt to create new law outside the parameters of the Governor's constitutional authority.

Just as Mr. Smith and Mr. Lambrecht have an interest in protecting their legal rights under Act 150, the Majority Caucus has a legally enforceable interest in preserving their legislative authority and maintaining the constitutionally prescribed balance of power upon which the Commonwealth is built. As such, this Court should reverse and remand to accord intervenor status to the Majority Caucus.

CONCLUSION

For the reasons articulated above, this Court should reverse the Commonwealth Court's order denying the Majority Caucus's Application and remand to allow the Majority Caucus to intervene.

Respectfully submitted,

THE FAIRNESS CENTER

September 21, 2015

A handwritten signature in black ink, appearing to read "D. Osborne", written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limits of Pennsylvania Rule of Appellate Procedure 2135a(1). This brief contains 4,134 words, according to the word count feature of the word processing program used to prepare the brief.

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The undersigned hereby certifies that a copy of Brief of Appellees David W.

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