



# Commonwealth of Kentucky

## Court of Appeals

NO. 2008-CA-002000-OA

INTERACTIVE MEDIA  
ENTERTAINMENT AND  
GAMING ASSOCIATION, INC.

PETITIONER

v.

AN ORIGINAL ACTION  
ARISING FROM FRANKLIN CIRCUIT COURT  
ACTION NO. 08-CI-01409

HONORABLE THOMAS D. WINGATE,  
JUDGE, FRANKLIN CIRCUIT COURT

RESPONDENT

COMMONWEALTH OF KENTUCKY, EX  
REL. J. MICHAEL BROWN, SECRETARY,  
JUSTICE AND PUBLIC SAFETY CABINET;  
AND JACK CONWAY, ATTORNEY  
GENERAL, CABINET OF KENTUCKY

REAL PARTIES IN INTEREST

AND

NO. 2008-CA-002019-OA

PLAYERONLY.COM; SPORTSBOOK.COM;  
SPORTSINTERACTION.COM;  
MYSportsbook.com; AND LINESMAKER.COM

PETITIONERS

v. AN ORIGINAL ACTION  
ARISING FROM FRANKLIN CIRCUIT COURT  
ACTION NO. 08-CI-01409

HONORABLE THOMAS D. WINGATE, JUDGE  
FRANKLIN CIRCUIT COURT

RESPONDENT

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

REAL PARTY IN  
INTEREST

AND NO. 2008-CA-002036-OA

VICSBINGO.COM AND INTERACTIVE  
GAMING COUNCIL

PETITIONERS

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
ACTION NO. 08-CI-01409

HONORABLE THOMAS D. WINGATE,  
JUDGE, FRANKLIN CIRCUIT COURT

RESPONDENT

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

REAL PARTY IN INTEREST

ORDER  
GRANTING PETITION FOR  
WRIT OF PROHIBITION

\*\* \* \* \* \*

BEFORE: CAPERTON, KELLER AND TAYLOR, JUDGES.

These consolidated petitions for a writ of prohibition stem from orders of the Franklin Circuit Court seizing 141 Internet domain names identified in a civil complaint filed by the Justice and Public Safety Cabinet of the Commonwealth of Kentucky. The trial court justified the seizure order on the basis that the domain names constituted "gambling devices" subject to the court's in rem jurisdiction. The petitioners argue that they are entitled to the extraordinary remedy of prohibition because the Franklin Circuit Court is acting outside its jurisdiction and the parties have no adequate remedy by appeal. Having considered the consolidated petitions for relief, the response of the Cabinet, the briefs submitted by the amici curiae, argument of counsel, and being otherwise sufficiently advised, the Court ORDERS that the petitions be GRANTED and the Franklin Circuit Court is hereby PROHIBITED from enforcing its order seizing the 141 domain names and from conducting a scheduled forfeiture hearing.

There is no dispute as to the facts. The Cabinet instituted a civil in rem action pursuant to Kentucky Revised Statute (KRS) 528.100 and KRS 500.090 against 141 named domain defendants for the purpose of stopping, as stated in

their response, "unregulated, unlicensed illegal Internet gambling that is occurring within the Commonwealth, in blatant disregard for, and in violation of, Kentucky law." After conducting an *ex parte* hearing on the Cabinet's application for seizure and forfeiture of the domain names, the Franklin Circuit Court entered an order on September 18, 2008, adjudging that:

1. Probable cause did and does exist under KRS 528.100 to believe that the Domain names listed on Exhibit A [the 141 domain names in issue here] were and are being used in connection with illegal gambling activity within the Commonwealth of Kentucky in violation of KRS Chapter 528.
2. A sufficient basis did and does exist for the seizure and forfeiture of the Domain Defendants by the Commonwealth.
3. The Domain Defendants are properly seized by the Commonwealth of Kentucky pursuant to KRS 528.100.

The order also directed the domain names to be "immediately transferred by their respective Registrars" to an account or other Registrar as designated by the Commonwealth and set a forfeiture hearing pursuant to KRS 500.090.

After the forfeiture hearing conducted on September 26, 2008, the trial court entered an order on October 2, 2008, which granted the motions of the Interactive Gaming Council (IGC), Interactive Media Entertainment and Gaming Association, Inc. (iMEGA), and counsel for seven specifically enumerated domain names (7 Domain Names) for leave to intervene in order to appear and assert the rights of their members regarding the following issues:

a) whether the Intervening Parties have standing to appear in this matter; b) whether this Court has jurisdiction; c) whether the Domain Defendants are property; d) whether the Domain Defendants constitute a "gambling device or gambling record" for purposes of KRS Chapter 528; and e) whether poker is "gambling" for purposes of KRS Chapter 528.

That order also provided that if the trial court determined that jurisdiction exists and that the domain defendants were properly subject to forfeiture, only the owners of the domain defendants would be permitted to appear and defend the forfeiture.

Finally, the trial court entered the October 16, 2008 order which precipitated the petitions now under review by this Court. In essence, that order set forth the followings conclusions of the trial court:

1. that it had jurisdiction to adjudicate the Cabinet's civil forfeiture claim;
2. that there was a reasonable basis for the Court to assert jurisdiction over the domain names and their owners/operators;
3. that the domain names are property subject to *in rem* jurisdiction;
4. that the domain names are "gambling devices" subject to seizure and forfeiture;
5. that the seizure was consistent with Due Process;
6. that the Secretary of the Justice Cabinet has standing to bring the action on behalf of the Commonwealth;
7. that IGC and iMEGA lacked standing to intervene but could continue to appear as amici; and
8. that counsel for the group of 7 Domain Names must disclose the identities of the persons who engaged them and divulge their interest in the *res*.

A final hearing on forfeiture was scheduled for November 17, 2008, which was later rescheduled for December 3, 2008. This Court subsequently entered a stay of that forfeiture hearing to allow for oral argument on the consolidated petitions.

### ANALYSIS

As a preliminary matter, we address the availability of the extraordinary remedy of prohibition as an avenue of redress for the seizure of the 141 domain names. Writs are generally divided into two classes: (1) those where the inferior court is acting without jurisdiction; or (2) those in which the court is acting within its jurisdiction but erroneously. *Grange Mutual Insurance Co. v. Trude*, 151 S.W.3d 803, 808 (Ky. 2004). If the inferior court is acting erroneously but within its jurisdiction, a writ may be granted if "there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted." *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004). However, irreparable harm need not be shown "provided a substantial miscarriage of justice will result if the lower court is proceeding erroneously, and correction of the error is necessary and appropriate in the interest of orderly judicial administration." (Emphasis in original) *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961). Finally, we note that the right to appeal does not necessarily indicate an adequate remedy. *Chamblee v. Rose*, 249 S.W.2d 775, 777 (Ky. App. 1952).

Thus, the focus of our inquiry is necessarily whether the trial court had jurisdiction to act. This determination requires analysis of two factors: 1) whether petitioners have standing to pursue a writ in this forum; and 2) whether the domain names fit within the statutory definition of "gambling devices" so as to trigger subject matter jurisdiction over the nature of the case and the type of relief sought.

Although the trial court concluded in its October 16<sup>th</sup> order that the associations had no standing to advance the interests of their members, the fact remains that they were initially granted leave to intervene to assert those very interests. Having participated in the proceedings below, and given the adverse ruling on their claims of lack of jurisdiction, we find no basis for denying those same participants the right to seek relief in this proceeding.

Next, because the Cabinet predicated its claim of entitlement to seize the domain names upon their status as illegal gambling devices, we turn our attention to a matter of statutory construction. Before proceeding, we note that the single issue presented in this regard, whether domain names fall within the statutory definition of KRS 528.010(4), is purely a matter of law and is subject to *de novo* review by this Court. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000).

KRS 528.010(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; [Emphasis added.]

Suffice it to say that given the exhaustive argument both in brief and oral form as to the nature of an Internet domain name, 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." We are thus convinced that the trial court clearly erred in concluding that the domain names can be construed to be gambling devices subject to forfeiture under KRS 528.100.

We find the analysis of subject matter jurisdiction in this case remarkably similar to the analysis set out by the Supreme Court in *J.N.R. v. O'Reilly*, 264 S.W.3d 587 (Ky. 2008). In that case, the Supreme Court concluded that the General Assembly's decision to enact a narrow definition of "out-of-