No. _____

In The

Supreme Court of the United States

ROBERT G. HICKS, INDIVIDUALLY,

Petitioner,

v.

CITY OF HOPKINSVILLE, SEWERAGE AND WATER WORKS COMMISSION, D/B/A HOPKINSVILLE WATER ENVIRONMENT AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The Kentucky Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In an eminent domain proceeding in state court involving non-residents, does a failure to cite in any pleadings preceding essentially a default judgment (or in that judgment itself) the statute establishing jurisdiction and the statute or civil rule establishing the legal authority for service of process undertaken and a failure to demonstrate in the court file any actual service on either respondent or any reasonable rationale for actual service of process not being made, cause that judgment to fail to comply with the Due Process Clause under the 14th Amendment, Section 1, of the U. S. Constitution?

Does depublication by a state's highest court of one of its intermediate court's clearly erroneous opinions (which included an express refusal to address U. S. Constitutional law issues as being "moot") without granting requested discretionary review, deny an adversely impacted party to the litigation Due Process, and protection of the Supremacy Clause (Article VI, Paragraph 2) and/or Equal Protection of the law under the 14th Amendment, Section 1, of the U. S. Constitution?

LIST OF PARTIES

A list of all parties to the proceeding in the court whose opinion is the subject of this Petition is as follows:

The Petitioner is Robert G. Hicks, individually.

Robert G. Hicks, trustee of the Roberta Cherry Hicks Testamentary Trust, is not a party to this Petition as the Kentucky Court of Appeals has ruled that he has yet to be served with process in his fiduciary capacity, and, thus, there is no jurisdiction over him in his fiduciary capacity.

The Respondent is City of Hopkinsville, Sewerage and Water Works Commission, D/B/A Hopkinsville Water Environment Authority.

STATEMENT OF RELATED CASES

City of Hopkinsville, Sewerage and Water Works Commission, D/B/A Hopkinsville Water Environment Authority v. Robert G. Hicks, Individually, and Robert G. Hicks, Trustee of the Roberta Cherry Hicks Testamentary Trust
Civil Action No. 20-CI-00875, Christian Circuit Court, Kentucky
Interlocutory Order and Judgment entered January 22, 2021

STATEMENT OF RELATED CASES – Continued

Robert G. Hicks, Individually, and Robert G. Hicks, Trustee of the Roberta Cherry Hicks Testamentary Trust v. City of Hopkinsville, Sewerage and Water Works Commission, D/B/A Hopkinsville Water Environment Authority
No. 2021-CA-0219-MR, Kentucky Court of Appeals
Opinion Affirming in Part, Reversing in Part, and Remanding rendered April 8, 2022

Robert G. Hicks, Individually, and Robert G. Hicks, Trustee of the Roberta Cherry Hicks Testamentary Trust v. City of Hopkinsville, Sewerage and Water Works Commission, D/B/A Hopkinsville Water Environment Authority
No. 2022-SC-0225-D, Supreme Court of Kentucky
Order Denying Discretionary Review entered October 12, 2022

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PETITION FOR WRIT OF CERTIORARI

In denying a petition for discretionary review and in depublishing, basically on its own motion, the opinion of the Kentucky Court of Appeals, the Kentucky Supreme Court let stand an opinion that failed to address U. S. Constitutional issues by holding them to be moot, totally ignoring the argued principles of Due Process as embodied in the holdings of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Jones v. Flowers*, 547 U.S. 220 (2006). The determination of mootness in the face of the Supremacy Clause was based on the misinterpretation and impermissible judicial expansion of KRS Section 454.210(2)(a)6 and ignoring of controlling case authority on that statute of the Kentucky Supreme Court in *Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51 (Ky. 2011) and *Hinners v. Robey*, 336 S.W.3d 891 (Ky. 2011). Even had the Kentucky Court of Appeals been correct in its interpretation of the statute, the opinion further overlooked multiple additional Due Process issues that occurred in the failure, in the certified mailing process, to effectuate any manner of service of process on either of the two non-resident landowners in an eminent domain action.

The Due Process, Equal Protection, and Supremacy Clause issues beg consideration. The importance of these pillars of U. S. Constitutional Law need to be reinforced with the Kentucky court system. In the face of attempts to distinguish general rules of bedrock constitutional law cases such as *Mullane* and *Jones v. Flowers*, it may be important that the Bar in general

be reminded by the United States Supreme Court of the general rules of these cases and that they are fully applicable in matters of service of process, not to be attempted to be distinguished into obscurity as nothing more than cases pertaining to "notice."

Failure to insure to the degree possible that judgments of courts are not subsequently subject to attack on jurisdictional grounds is uneconomical, unjust, and works potentially to the disadvantage of innocent parties by imposing unnecessary costs on society through inefficient operation of the courts. To the extent that this Court can impress upon courts and practitioners the importance of proper service of process, this Court should indulge every opportunity to do so.

The denial of discretionary review by the Kentucky Supreme Court, together with its depublication of the Kentucky Court of Appeals opinion, which raised Due Process and Supremacy Clause issues on its face, resulted in the Kentucky Supreme Court, the highest court in the Commonwealth of Kentucky, abusing its discretion and thereby raising Due Process and Equal Protection issues which can only find review by the United States Supreme Court taking up this case.

OPINIONS BELOW

The opinion of the highest court to review the merits is that of the Kentucky Court of Appeals (App. 1-20), 2022 WL 1051985, issued April 8, 2022, which was designated for publication by that court, but was

depublished by the Kentucky Supreme Court by unpublished order entered October 12, 2022 (App. 29). The Kentucky Court of Appeals denied rehearing in an unpublished order entered May 18, 2022 (App. 21). The trial court entered an Interlocutory Order and Judgment on January 22, 2021, which is unpublished (App. 22-24). The trial court's order denying Motion to Dismiss Petition for Condemnation and Motion to Strike Motion for Interlocutory Order and Judgment entered January 26, 2021 (App. 25-26) is unpublished. The trial court denied a motion for rehearing in its order entered February 17, 2021 (App. 27-28) which is unpublished. The order of the Kentucky Supreme Court denying discretionary review entered October 12, 2022 (App. 29) is unpublished.

JURISDICTION

The order of the Kentucky Supreme Court denying the Petition for Discretionary Review of the Kentucky Court of Appeals opinion, and depublishing same, in this case was entered on October 12, 2022. A copy of that order appears at App. 29. This Court has jurisdiction under Article III, Section 2, Clause 2 of the United States Constitution as implemented by 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, to the United States Constitution states, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article VI, Paragraph 2 of the United States Constitution states, in relevant part:

"This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

KRS 454.210(2)(a) states: "A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

. . .

6. Having an interest in, using or possessing real property in this Commonwealth, providing the claim arises from the interest in, use of, or possession of the real property, provided, however, that such in personam jurisdiction shall not be imposed on a nonresident who did not himself voluntarily institute the relationship, and did not knowingly perform, or fail to perform, the act or acts upon which jurisdiction is predicated."

KRS 454.210(2)(b) states: "When jurisdiction over a person is based solely upon this section, only a claim

arising from acts enumerated in this section may be asserted against him."

STATEMENT OF THE CASE

The case being appealed is an eminent domain action for the taking of a permanent easement and a construction easement for a municipal water project. The City of Hopkinsville unsuccessfully dealt directly with the landowners for a period of time, seeking to have the needed easements donated. After finally making unacceptable offers for purchase of the easements, it filed suit against the two non-residents. Service of process was attempted by the Kentucky Secretary of State mailing process by certified mail, return receipt requested, to two different addresses. One mailing was to an incorrect address that had appeared on an old deed. There has been no confirmation through the U. S. Postal Service as to what became of the other mailing, mailed to Petitioner's post office box in Leesburg, Florida. The Kentucky Secretary of State filings with the Christian County Clerk of Court are consistent with the foregoing. App. 50, 51, 53 and 54. The City made no further attempts to serve the landowners or to contact them at their customary postal address or email address concerning the suit the City had filed.

Petitioner, Robert G. Hicks, received notice from his office of a copy of a Motion for Interlocutory Order and Judgment the day before an order on that motion was to be sought by the City. Thereupon, Petitioner

emailed the attorney for the City stating that he had not been served process as represented in the City's motion. App. 45. Petitioner tendered, by email, to the City's attorney a Motion to Dismiss Petition for Condemnation (based on a failure to effectuate service of process) and a Motion to Strike Motion for Interlocutory Order and Judgment (because jurisdiction had not been established over the parties because there had been no service of process). App. 38-40.

The court, having been provided by the City's attorney as an attachment to an *ex parte* email with a copy of Petitioner's motions (App. 41), proceeded to enter the order granting the taking without a hearing (App. 22-24).

In nothing preceding that order did anything in the pleadings or court file cite the legal authority under which the City alleged service of process to have been made or the proof the City had of the making of that service, though Petitioner requested such information of the City's attorney by email prior to the order being entered. App. 45-47.

FACTUAL BACKGROUND AND GENERAL LEGAL ARGUMENT

This is the story, charitably, of the good ole boys and good ole gals running amuck in Kentucky to the embarrassment of the breadth of the legal system in that Commonwealth and jurisprudence in general. It

is a story that would have defied creation in fiction, would that it were fiction.

Petitioner, Robert G. Hicks, a Florida resident, owns property in Christian County, Kentucky, and has owned that property for 45 years. Part of this property is located in the City of Hopkinsville along a four lane divided highway. The property is owned as tenants in common by Petitioner, individually, and by a trust of which he is sole trustee, the Roberta Cherry Hicks Testamentary Trust.

The story has its beginnings in the City of Hopkinsville, through Hopkinsville Water Environment Authority, for a couple of years, by U. S. mail and email and at least one personal meeting, soliciting Petitioner to donate an easement for a watermain project. With that failing, the City, by its legal counsel, Dan Kemp, finally made what Petitioner deemed an unacceptable offer. A further suggestion of parameters of an offer for settlement purposes was made by Petitioner and was rejected. App. 55-57. A condemnation action was threatened. All parties and their counsel were aware that Petitioner was a lawyer, with his mailing address and email address in the letterhead of his correspondence with them (App. 55), and all should take judicial notice, was easily locatable through the Bar directory as well.

A couple of months after the Petition for Condemnation was filed, a copy of a Motion for Interlocutory Order and Judgment, dated January 11, 2021, arrived in Petitioner's mail, signed by the City's counsel,

Duncan Cavanah. The motion was not a verified pleading, nor was it required to be, except for the fact that it was thereafter learned by Petitioner to be the only statement in the file speaking to purported service of process with specificity. There were no attachments to the motion. The motion recited that suit had been filed on November 17, 2020, that Petitioner had been served with process "on or about December 2, 2020," and that there had been a failure "to file an answer or other pleading." The motion recited under a Notice of Hearing heading: "Please take notice that pursuant to CR 78(2), the foregoing Motion is being submitted to the Court for decision without an oral hearing. This Motion may be routinely granted within ten (10) days after filing unless an objection is received, or a Response is filed," which, at the time Petitioner became aware of the motion, was on the following day.

In point of fact, this notice appears to have been made under authority of local rule 5 (KY RCCC Rule 5) as authorized by Kentucky Rule of Civil Procedure Rule 78, but such has never been stated by the City or its attorneys.

Rule 78 reads in its entirety:

> "(1) Each circuit and district court shall establish by rule regular motion days as required by statute, and a copy of the rules shall be certified to the Supreme Court as provided in SCR 1.040(3)(a).
>
> (2) To expedite its business, the court may make provision by rule or order for the

submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition."

KY RCCC Rule 5 reads in its entirety:

"A movant may bring his or her motion under CR 78(2), which makes provisions for the determination of motions without oral hearings upon brief written statements of reasons in support and opposition. A proposed order shall accompany the motion.

The movant shall give notice that the motion is made under CR 78(2) and shall direct the attention of the opposing attorney (or party if there is no attorney) to the fact that under this local rule, the motion may be granted routinely by the Court ten days after filing unless a response is filed. The notice shall be substantially in the following form:

> 'The foregoing motion is submitted to the Court for decision pursuant to CR 78(2). This motion will routinely be granted by the Court in ten days unless a response is filed. Should the party opposing the motion under CR 78(2) wish to have an oral hearing on the question, he or she may in the response so state. After checking with the Clerk's office, as outlined above, that party shall proceed to set the motion for a Motion Day at a given time.'

Motions should be filed under either CR 78(2) or noticed as set out above at RCCC 3. Motions which are not filed under one or the

> other of these provisions may be considered defective or nugatory and void.
>
> A Motion to set a case for trial shall not be brought under CR 78(2)."

The differences between the language in the Notice of Hearing section of the Motion for Interlocutory Order and Judgment and the suggested form for the notice contained in KY RCCC Rule 5 are readily apparent and material. Furthermore, the Motion for Interlocutory Order and Judgment were served on the Trust by mail at the Jacksonville address, though the Kentucky Secretary of State's Office had reported in a memo to the Court on January 5, 2021 (and such memo was in the court file) that the summons directed to the Jacksonville address was returned "not deliverable as addressed/unable to forward." App. 50-51. This observation is made as indicative of the degree to which the City had disregard for actual service of anything on either party and the degree to which it failed to follow up with contact by known and used email.

In all rights, it is clear that the Motion for Interlocutory Order and Judgment should not have been granted and order entered simply on the basis of the defective Notice of Hearing section in the Motion for Interlocutory Judgment and the violation of Due Process that was thereby worked against Petitioner. With the actual knowledge by the court and counsel of the Motion to Dismiss Petition for Condemnation and the Motion to Strike Motion for Interlocutory Order and Judgment (App. 38-40), there is no place for the

Interlocutory Order and Judgment being entered on January 22, 2021 (App. 22-24). This is particularly true given counsel's *ex parte* communication with Judge Self on the subject on January 22, 2021 (App. 41) if there was to be no "hearing" *per se*, all of this being contrary to traditional notions of Due Process.

The Motion for Interlocutory Order and Judgment does not even appear to be a motion to which KY RCCC Rule 5 could or should apply. The last sentence of that rule states: "A Motion to set a case for trial shall not be brought under CR 78(2)." With that being the case, it would seem highly unlikely that a motion to enter a final appealable order, such as a motion for summary judgment or, in this case, basically a motion for default, could be entered pursuant to Rule 5, as these matters are more weighty than a motion to set and are not such matters as should be used by a court "to expedite its business." Kentucky Rules of Civil Procedure Rule 78(2).

Petitioner immediately emailed Duncan Cavanah (the attorney who had filed the motion on behalf of the City) and copied Dan Kemp (who had previously stated that he would be an attorney assisting in the representation of the City in the eminent domain litigation) on Petitioner's email. App. 45-47. This was the first contact that had occurred between Petitioner and the City or its agents or counsel since the time negotiations concerning the easements had broken down. There had been no courtesy copy of the Petition for Condemnation despite a commonly used email address and postal mailing address and despite the fact that many

jurisditions now require that court filings be made and served electronically on parties.

Petitioner, in his email of January 21, 2021 to Duncan Cavanah, copied on Daniel Kemp, denied the allegation in the Motion for Interlocutory Order and Judgment concerning service of process, requested counsel's legal authority for whatever service of process had purportedly been made (as none was recited in the Motion), requested proof of whatever service had allegedly been made (as none was referenced or attached to the Motion for Interlocutory Order and Judgment), and requested that the Motion be withdrawn as it made, on its face, an erroneous representation to the court on the crucial matter of service of process. App. 45-47. By this, Petitioner believed himself to be complying with the very letter of the Notice of Hearing portion of the Motion for Interlocutory Order and Judgment and that these emails (App. 45-47) and Petitioner's motions (App. 38-40) constituted sufficient "objection" and "Response" under the wording of the Notice of Hearing as provided to Petitioner, particularly with Judge Self having actual knowledge of the Motion to Dismiss Petition for Condemnation and the Motion to Strike Motion for Interlocutory Order and Judgment. App. 41.

Ethical obligations of counsel as an officer of the court to correct misrepresentations to the court that have been made in pleadings as to service will not be discussed. These obligations have been glossed over by the courts though repeatedly raised by Petitioner with them in this case. App. 18.

At this point, all of which follows would not have happened had Duncan Cavanah complied with the aforementioned reasonable and appropriate requests. There would have been minimal damage. Reset. Revisit square one. Effectuate service properly on both parties to the litigation. There this story would have ended.

Instead, the City's position, distilled to its essence, at every level, at every opportunity, has been that the City has a right to exercise eminent domain power, that the proposed taking is proper in all respects as a foregone conclusion and any and all irregularities that could possibly suggest otherwise are nothing more than harmless error, that all that has been determined to date is the taking, that the right to appeal an Interlocutory Order and Judgment is a statutory formality without substance, that the condemned property rights should be surrendered without any review of the terms of the proposed easement, and that the only matter of any consequence remaining in the condemnation process is to be determined in a proceeding subsequent to the upholding of the Interlocutory Order and Judgment, that matter being the determination of the amount of damages to be awarded for the taking of the easements. Never mind the clear inapplicability of KRS 454.210(2)(a)6 to an eminent domain action (that statute being the City's ultimately argued lynchpin [at App. 7, "Appellee argues that it fully complied with the long arm statute . . . Appellee . . . argues that Appellee strictly complied with the statutory scheme for giving notice to nonresidents via the long arm

statute."], and the lynchpin of the Kentucky Court of Appeals' clearly erroneous opinion [at App. 14, "whether the long arm statute is the proper means by which to give notice to a nonresident condemnee. We must answer this question in the affirmative." At App. 15, "The circuit court may properly exercise jurisdiction over a person who possesses a property interest within the Commonwealth. KRS 454.210(2)(a)6."]), disregard the egregious facts surrounding failure to do more to see that service of process was demonstratively established, and factually distinguish precedent as opposed to focusing on long established constitutional law principles (such as *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) as more recently espoused in *Jones v. Flowers*, 547 U.S. 220 (2006)). Never mind that the City was aware of existing controversy with the Petitioner pertaining to the proposed easement (App. 55-57) and the fact that Petitioner filed an affidavit in the trial court stating that he would answer or respond to the Petition for Condemnation once properly served. App. 45-47.

Having no assurance from the City's counsel that the Motion for Interlocutory Order and Judgment would be withdrawn, Petitioner prepared: (1) a Motion to Dismiss Petition for Condemnation (based on a lack of jurisdiction as service had not been made on Petitioner), and (2) a Motion to Strike Motion for Interlocutory Order and Judgment (because that motion for order was premature because there was no jurisdiction because there had been no service of process). App. 38-40. These motions were emailed by Petitioner to the

City's counsel, Duncan Cavanah and Daniel Kemp, on the day before the order of Interlocutory Order and Judgment was entered and were seen by that counsel the day before Duncan Cavanah submitted his proposed Interlocutory Order and Judgment to Judge Andrew Self by email. App. 40.

It was requested by Petitioner that Petitioner's motions be provided to the court before entry of the Interlocutory Order and Judgment if it were decided to proceed on that misguided course. App. 46. The City's attorney, Duncan Cavanah, emailed Petitioner that the file would be put before the judge and the judge could decide if service of process had been legally sufficient. App. 47.

A motion to extend time to answer or respond would not have been appropriate as neither of the landowners were before the court. Neither of them had been properly served with process. Such appearance as had been made before the court had been basically a special appearance to contest jurisdiction.

Duncan Cavanah, the City's counsel, did not withdraw his motion and engaged in *ex parte* email with Judge Self in which he emailed a copy of Petitioner's motions (the Motion to Dismiss Petition for Condemnation and the Motion to Strike Motion for Interlocutory Order and Judgment), recognized the lack of clarity in the file concerning service of process on petitioner individually, admitted that he had not personally reviewed the court file but was working on the basis of what the Christian County Clerk's Office had

told him, and, himself, openly raised the prospect of an evidentiary hearing if the judge thought appropriate. App. 41.

Judge Self, without hearing (in point of fact, no evidentiary hearing has been conducted in this proceeding to date), proceeded to enter the proposed order tendered by Duncan Cavanah, the City's counsel. App. 22-24. There was nothing in the file to indicate that the property owners had received service of process pertaining to the condemnation action, or any reciting of the statute or civil rule under which service had been effectuated, or any indication that any person or entity had served as agent for Petitioner in receiving process.

Thereafter, on January 26, 2021, the Court simply, by calendar order, formally denied the Motion to Dismiss Petition for Condemnation and the Motion to Strike Motion for Interlocutory Order and Judgment. App. 25-26. No legal authority or reasoning whatsoever was provided.

Petitioner proceeded to engage local counsel, Kenneth W. Humphries, for the sole purpose of having the erroneous orders of January 22, 2021 and January 26, 2021 set aside. This seemed a very simple and straightforward assignment, given the state of the court file at the time the Interlocutory Order and Judgment was entered and the fact that the order should have been based on nothing more than what was in the court file on the date of entry of the order and Duncan Cavanah (and presumably the court) having been expressly put

on actual notice by Petitioner of the failure to effectuate service of process on either landowner prior to the entry of the Interlocutory Order and Judgment. This was particularly true as the court file showed that the attempted mailing of process to the Trust had been to an address that, in fact, had not been correct for in excess of 20 or so years and was inconsistent with the address in the City's own tax rolls. The Kentucky Secretary of State had reported the failed mailing to the Christian County Clerk of Court and such was in the court file (App. 50-51) and was also available from the Kentucky Secretary of State at the time the Interlocutory Order and Judgment was entered. As to Petitioner, the report made to the Christian County Clerk of Court as to the mailing directed to the Leesburg, Florida, post office box was consistent with a lost piece of mail. App. 53-54. No United States Postal Service tracking information would show that the mailing to Petitioner ever arrived at his local United States Post Office.

Petitioner's counsel filed basically a motion to reconsider, seeking to set aside the Interlocutory Order and Judgment. During this time, the Kentucky long-arm statute, KRS 454.210, was mentioned for the very first time.

At the zoom hearing on this motion on February 17, 2021, the failures in the mailings of process were brought to the attention of the court and discussed in detail, with nothing even slightly suggesting or showing that process could have been received by the landowners or how. The Court, through its own questioning,

elicited a confirmation from Petitioner's counsel that the City had technically complied with the requirements of the long-arm statute. More importantly, however, there was no question posed by the court or argument presented by the City on whether the Kentucky long-arm statute even potentially applied or how it could be argued to be applicable, given the convoluted nature of that statute as it pertains to real estate. KRS 454.210(2)(a)6. App. 31.

Service of process and jurisdiction was a matter on which the City had the burden of proof as such was crucial to establishing jurisdiction over parties who were clearly non-residents. The court recognized that the correct address for the Trust mailing had not been used by the City, but Judge Self openly stated that he was not going to make the City go back and take any corrective action in this regard.

Petitioner and his local counsel, Kenneth W. Humphries, shortly parted ways over the conduct of that hearing and his counsel's failure to make more of the total failure to actually serve process on either party, his handling of the inapplicable Kentucky long-arm statute issue, his failure to cite and argue the Kentucky Supreme Court cases of *Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51 (Ky. 2011) and *Hinners v. Robey*, 336 S.W.3d 891 (Ky. 2011) if he had done the slightest bit of research on the Kentucky long-arm statute, and his disparaging remark to the court that this case was only one of a technical issue over service.

The case proceeded on appeal to the Kentucky Court of Appeals, which conducted a *de novo* review of application of KRS 454.210 to the facts of this case as the case involved a question of law. App. 4. Petitioner argued the cases of *Caesars Riverboat Casino* and *Hinners* in earnest, as it could not be more clear under the first prong of the two prong test in these cases that KRS 454.210(2)(a)6 and KRS 454.210(2)(b) can not apply to an eminent domain action. The clear general rules of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Jones v. Flowers*, 547 U.S. 220 (2006) were argued as applicable and that a one attempt and done approach to mailed service of process does not meet Due Process parameters when there is nothing in the court file supporting any notion that service by mail to either party was ever received or refused by them, and when, based on an ongoing relationship, the correct mailing address and email address is known and has recently been used by those responsible for effectuating service of process.

The Kentucky Court of Appeals did rule that the Trust had not been properly served, that an incorrect address had been provided by the City for use for attempted service, and that the Trust could not be constructively served with process by serving the trustee in his individual capacity. Therefore, the Trust was not before the court and must be served. App. 17 and 18. Thus, the Trust is not a party to this Petition for Writ of Certiorari.

The troubling part is that the Kentucky Court of Appeals opinion is the first of the rulings in this case

to expressly mention KRS 454.210(2)(a)6. The court did not give any real consideration to *Caesars Riverboat Casino* or *Hinners* (which opinions had interpreted KRS 454.210(2)(a), the umbrella over KRS 454.210(2)(a)6, and the reinforcement provided in KRS 454.210(2)(b) "only a claim arising from acts enumerated can be asserted." *Caesars Riverboat Casino* itself states: "Only after the requirements of KRS 454.210 have been satisfied can it be said that personal jurisdiction over a non-resident extends to the outer limits permitted by federal due process. Federal due process cannot act to expand the reach of Kentucky's long-arm statute beyond its statutory language."

The Kentucky Court of Appeals basically just emphatically stated that KRS 454.210(2)(a)6 may as well be read as applying in any case in any manner pertaining to Kentucky real estate, period. App. 14 and 15. It further goes into minimum contacts analysis (App. 14) instead of being reined in by the quote in the immediately preceding paragraph, language expressly limiting by statute minimum contacts analysis when the statute provides a non-resident greater protection as to matters involving real estate.

The courts and opposing counsel have refused to walk through how the provisos of KRS 454.210(2)(a)6 and KRS 454.210(2)(b) are met because it can not be done with the slightest degree of intellectual integrity with respect to an eminent domain action. An eminent domain action may be the clearest of actions regarding real estate that could not possibly meet the requirements of "acts" and claims "arising from acts

enumerated," wording from the statute, as opposed to mere status as a landowner.

It should not be lost on anyone that the Kentucky long-arm statute differs from all other long-arm statutes in the country as to real estate. See Vedder, Price, Kaufman & Kammholz, "Long Arm Statutes: A Fifty State Survey" (2003). All other state statutes are framed in terms of the long-arm statute being coextensive with what is permissible under the United States Constitution or the statute mentioning ownership of real estate in the state as being a matter which will *ipso facto* cause a person to be subject to the jurisdiction of the courts of that state (ownership of land in the state providing minimum contacts sufficient for constitutional scrutiny). The Commonwealth of Kentucky can not come within the latter of these two groups of statutes by judicial fiat.

The Kentucky Court of Appeals then says that because KRS 454.210(2)(a)6 is receiving an interpretation "real estate" (a first impression ruling) and Petitioner owned real estate that the statute applies, that he is deemed properly served by service of process on the Kentucky Secretary of State as his agent, and that the default stands. Never mind that Petitioner never in pleadings, order, or summons (even had he received summons as the City had contemplated) prior to entry of the Interlocutory Order and Judgment (App. 22-24) had notice of potential application of KRS 454.210 in any form. Because it reaches this conclusion, the Kentucky Court of Appeals rules the U. S. Constitutional questions (*Mullane* and *Jones v.*

Flowers arguments) to be moot (App. 18) and does not even begin to attempt to address them. One is deemed to have received service of process only because of the existence of a state statute (which has not been demonstrated to apply) and, therefore, the U. S. Constitution and the Due Process clause mean nothing, despite the most egregious of facts and circumstances? The Kentucky Court of Appeals expressly and the Kentucky Supreme Court implicitly (in refusing discretionary review) has refused to address the Due Process constitutional law issues. In so refusing, both are clearly in violation of the Supremacy Clause.

Nothing could be more disturbing, one would think, particularly when the Kentucky Court of Appeals had designated this opinion as one to be published in the regional reporter system. App. 1. However, when this was brought back before the Kentucky Court of Appeals on a Petition for Rehearing and these arguments again made in that written petition to be certain something had not been missed, the Kentucky Court of Appeals simply denied the Petition for Rehearing. App. 21.

A Petition for Discretionary Review is then made to the Kentucky Supreme Court raising the same arguments. While it could be said that *Caesars Riverboat Casino* and *Hinners* should have been adequate Kentucky Supreme Court authority on the point together with the slightest bit of basic statutory interpretation, frame it to the court as a case of first impression on KRS 454.210(2)(a)6, emphasize how the Kentucky Court of Appeals opinion was mischief of the highest

order to jurisprudence if published, and one could reasonably expect that discretionary review would be granted? Wrong! The Kentucky Supreme Court declines discretionary review and depublishes the Kentucky Court of Appeals opinion! App. 29.

The question becomes what is the consequence of all of this from a Due Process and Equal Protection standpoint? There has been a heroic effort of trying to get recognition of basic Due Process principles multiple times at multiple levels and at the highest tribunal in the state in which the miscarriage of basic justice has taken place. In the final analysis, the highest court in Kentucky says, in effect, "We will do our best, on our own initiative, to be sure that this miscarriage of justice applies to no one else but you, but, at the end of the day, no apologies! We won't hear you! You're stuck with it!"

Thus, denial of discretionary review and depublication, in the face of this factual and procedural background rears its ugly head, with questions arising as to abuse of discretion, denial of Due Process, and denial of Equal Protection, violation of the Supremacy Clause, all arising from a string of indefensible rulings involving clear statutory requirements and basic tenants of Due Process, which, ultimately, the state's highest court says will fall on one person and one person alone to the best of its ability, under color of Kentucky Civil Rule 76.28(4).

Depublication attempts to save the day for the honor and credibility of the court, but does nothing for

the specific litigant who remains subject to the continuing error.

Depublication is rather new as a matter of state law, being a part of the state jurisprudence of Kentucky, California, and Arizona and is deserving of guidance from the United States Supreme Court in depublication's formative period, if it is to remain a part of jurisprudence.

Depublication is an unreviewable exercise of absolute discretionary power exercised and protected by confidentiality of internal judicial deliberations. Depublication of grossly erroneous lower court opinions provides no relief for the party already adversely effected by the lower court opinion and is no substitute for "discretionary review" which must have in fact taken place to a degree behind closed doors in order for depublication to have been considered and ordered.

As to depublication in Kentucky, the greatest insight that has been provided is that in remarks by Kentucky Supreme Court Justice Daniel Venters (Retired) (who, coincidentally, authored the Kentucky Supreme Court's opinion in *Caesars Riverboat Casino*) in Kentucky Appellate Survey Monthly (O'Brien Whitt Publishing, LLC), "Judicial Focus Q&A Justice Daniel Venters (Retired), Supreme Court." Therein, Justice Venters is quoted as follows:

> "As the final arbiter of Kentucky law, the Supreme Court of Kentucky sometimes 'depublishes' a Court of Appeals opinion in conjunction with the denial of discretionary

> review of that opinion. Here are some reasons why that might happen. The Supreme Court may generally agree with the outcome of the Court of Appeals opinion and find no special reason to grant discretionary review, yet nevertheless discern a flaw or disagreeable element about the analysis presented in the opinion. Sometimes, the Supreme Court is aware of issues developing in other cases that will conflict with or supersede the Court of Appeals opinion. Because we have no process by which the Supreme Court can edit Court of Appeals opinions, it has on a few occasions de-published Court of Appeals opinions that contain a simple mis-quoted or mis-cited authority.
>
> It may also be that a Supreme Court, sharply divided about the correctness of the Court of Appeals' opinion and whether to grant review, avoids the uncertainty about where the issue might ultimately land by denying review, leaving the Court of Appeals opinion in place but limiting its effect by de-publication."

Most charitably to the Kentucky Supreme Court, it is suggested that the present case likely falls within the immediately preceding paragraph of the quote. However, it is submitted that such is an abuse of discretion in failing to fully review a clearly erroneous opinion involving statutory construction, violation of the Due Process and Supremacy Clauses, and the de-publication working a denial of Equal Protection in the leaving of the litigant subject to a grossly erroneous

ruling while attempting to avoid impact on the public at large.

If the facts and circumstances presented by this case and the affronts to established principles of law can not find relief in the multiple times and levels to which they have now been carried, and if all reasonable expectations as to the application of the law can be thwarted, we all need to close our law books and go home. There will be no rule of law left to defend and no corner where the very basics of the rule of law is held sacred.

DISCUSSION OF PERTINENT AUTHORITY

No credible argument can be made for an eminent domain action to meet the following statutory standards.

KRS 454.210(2)(a) states: "A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

. . .

6. Having an interest in, using or possessing real property in this Commonwealth, providing the claim arises from the interest in, use of, or possession of the real property, provided, however, that such in personam jurisdiction shall not be imposed on a nonresident who did not himself voluntarily institute the relationship, and did not knowingly perform, or fail to perform, the act or acts upon which jurisdiction is predicated."

KRS 454.210(2)(b) states: "When jurisdiction over a person is based solely upon this section, only a claim arising from acts enumerated in this section may be asserted against him."

The following Kentucky Supreme Court case lays out the standards for application of the Kentucky long-arm statute and makes clear, under the analysis to be undertaken, that the statute can in no wise be applicable to an eminent domain action.

Caesars Riverboat Casino, LLC v. Beach, 336 S.W.3d 51, 56-57 states:

> "It is fundamental that in determining the meaning of a statute, we must defer to the language of the statute and are not at liberty to add or subtract from the legislative enactment or interpret it at variance from the language used. *Johnson v. Branch Banking and Trust Co.*, 313 S.W.3d 557, 559 (Ky. 2010). Upon application of this principle, an examination of the long-arm statute discloses no language indicating that its provisions should, *per se*, be construed as coextensive with the limits of federal due process. To the contrary, the statute sets forth nine specific provisions defining the kinds of activity that will allow a Kentucky court to exercise personal jurisdiction over a nonresident defendant. While we believe it fair to say that these provisions should be liberally construed in favor of long-arm jurisdiction, their limits upon jurisdiction must be observed as defined. Thus, non-resident defendants whose

> activities fall outside the criteria of KRS 454.210 may not be subjected to long-arm jurisdiction. In addition, as previously noted, even when the defendant's conduct and activities fall within one of the enumerated categories, the plaintiff's claim still must 'arise' from that conduct or activity before long-arm jurisdiction exists. Claims based upon contacts, conduct, and activities which may not fairly be said to meet one of these explicit categories must be held to be outside the reach of the statute, regardless of whether federal due process might otherwise allow the assertion of *in personam* jurisdiction.
>
> Moreover, we note that if the intent of the statute were to reach the outer limits of federal due process, it could easily have been drafted to say precisely that. In this vein, we note that some jurisdictions have phrased their long-arm statutes in just this way. . . . Only after the requirements of KRS 454.210 have been satisfied can it be said that personal jurisdiction over a non-resident extends to the outer limits permitted by federal due process. Federal due process cannot act to expand the reach of Kentucky's long-arm statute beyond its statutory language."

The general rules of *Mullane* are clearly applicable to service of process under the facts of the present case.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 states:

"'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

. . .

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U.S. 457; *Grannis v. Ordean*, 234 U.S. 385; *Priest v. Las Vegas*, 232 U.S. 604; *Roller v. Holly*, 176 U.S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean, supra*, and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly, supra*, and *cf. Goodrich v. Ferris*, 214 U.S. 71."

Mullane at 315 states:

"[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

Speaking specifically to Due Process involving certified mailings, the rules and language of *Jones v. Flowers* are directly on point as to the present case.

Jones v. Flowers, 547 U.S. 220, 231 states:

> "[I]f a feature of the State's chosen procedures is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure. After all, the State knew *ex ante* that it would promptly learn whether its effort to effect notice through certified mail had succeeded."

Jones at 237 states:

> "[T]he government repeatedly finds itself being asked to prove that notice was sent and received. Using certified mail provides the State with documentation of personal delivery and protection against false claims that notice was never received . . . [T]he State cannot simply ignore that information. . . ."

THE DENIAL OF DUE PROCESS CHECKLIST IN THIS CASE

1. Have the City, by and through its attorney, take a one and done approach to failed service of process by mail while in possession of a good mailing

address and email address for the landowners and having previously and recently made use of same.

2. Have the attorney represent in pleadings completion of service of process on landowners without any personal verification of same.

3. Have the attorney use a summary procedure without hearing on the Motion for Interlocutory Order and Judgment but fail to include the form of notice provision required in KY RCCC Rule 5.

4. Have the court and attorney overlook noncompliance with KY RCCC Rule 5 of their own local rules in furtherance of expediting "its business" in entering the Interlocutory Order and Judgment.

5. Have the attorney fail to respond to questions by the landowners concerning the statute or civil rule under which jurisdiction was obtained over landowners or similar information regarding service of process.

6. Have the attorney refuse to retract a pleading containing erroneous representation concerning service of process once same is called to his attention by landowners before entry of any order by a court.

7. Have the attorney and court on actual notice by pleading by landowners reciting their failure to be served process, but, for all practical purposes, disregard same.

8. Hold no evidentiary hearing on the issue of service of process, though the attorney and court are on actual notice, pre judgment, of failure of service.

9. Hold no hearing though landowners complied with the letter of the erroneous Notice of Hearing provision contained in the Motion for Interlocutory Order and Judgment.

10. Provide no notice in any pleadings of the statute or civil rule under which jurisdiction is purportedly obtained or to be obtained over landowners.

11. Include nothing in the counsel tendered court order granting City relief requested as to statute or civil rule under which jurisdiction was obtained over landowners or similar information regarding service of process.

12. *Post hoc* raise the purported basis for jurisdiction and service of process.

13. Rely on minimal compliance with a clearly inapplicable statute (KRS 454.210(2)(a)6) as the lynchpin for jurisdiction and service of process.

14. Disregard Kentucky Supreme Court authority (*Caesars Riverboat Casino* and *Hinners*) which make clear that KRS 454.210 could not apply unless and until the parameters of KRS 454.210(2)(a)6 are met, an impossibility.

15. Allege that compliance with a clearly inapplicable statute (KRS 454.210(2)(a)6) provides the basis for the Kentucky Court of Appeals not addressing U. S. Constitutional Due Process issues.

16. Fail to consider the implications of the general rules of *Mullane* and *Jones v. Flowers* to this case at any level.

17. Deny discretionary review at the Kentucky Supreme Court level, but depublish a totally indefensible opinion of the Kentucky Court of Appeals.

REASONS FOR GRANTING THE PETITION

The opinion of the Kentucky Court of Appeals is clearly erroneous, save in its ruling that the Trust can not be said to have been constructively served with process. The Kentucky Court of Appeals interpretation of KRS 454.210(2)(a)6 is clearly erroneous and thereby renders the entire opinion worthless. However, it is more than troubling that this petition is before the United States Supreme Court and begs the attention of the highest court of the land.

This petition requests confirmation that unbridled power of governmental entities combined with courts will not be allowed. A stated basis for jurisdiction over parties and adherence to Due Process standards in service of process are the prerequisites of any court proceeding that will not later be overturned. Attorneys, as officers of the court, must not abuse the judicial process by ignoring or playing games as to jurisdictional matters. Statutes must be read and applied or found not to apply as the case may be, not judicially rewritten. Bedrock rules of Due Process must be present to minds of attorneys and jurists and guide their actions

or our legal system descends into a quagmire of minutia and waste of time and money of the public, beyond the parties to the litigation, and confidence in our legal system suffers when there is not the slightest adherence to the very basics on which all should be able to agree.

This case needs to be the platform for a reminder for courts and counsel in Kentucky and across the nation of the very basics of Due Process as embodied in *Mullane* and *Jones v. Flowers* are applicable in the context of service of process, including eminent domain actions, and in the final analysis, that depublication by the Kentucky Supreme Court can not be used, in the face of the Supremacy Clause, to attempt to sweep dirt under the rug and not address Due Process violations.

CONCLUSION

The petition for a writ of certiorari should be granted to review the opinion of the Kentucky Court of Appeals entered on April 8, 2022 and the order of the Kentucky Supreme Court entered October 12, 2022, denying discretionary review, but depublishing the Kentucky Court of Appeals opinion.

Respectfully submitted,

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