

STATE OF WEST VIRGINIA

At a regular term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on May 31, 2011, the following order was made and entered:

California State Teachers' Retirement System; Amalgamated Bank, as trustee for the Longview Collective Investment Funds; and Manville Personal Injury Settlement Trust; derivatively on behalf of Massey Energy Company, Petitioners

vs.) No. 11-0839

Don L. Blankenship, Baxter F. Phillips, Jr., Dan R. Moore, E. Gordon Gee, Richard M. Gabrys, James B. Crawford, Bobby R. Inman, Robert H. Foglesong, Stanley C. Suboleski, J. Christopher Adkins, Jeffrey M. Jarosinski, M. Shane Harvey and Mark A. Clemens, and Massey Energy Company, Respondents

On a former day, to-wit, May 25, 2011, the petitioners, California State Teachers' Retirement System, et al., by A. Andrew MacQueen, their liaison counsel, presented to the Court their petition praying for a preliminary injunction to be directed against the respondents.

Thereafter, on May 27, 2011, the respondents, Dan R. Moore, et al., by A.L. Emch and Jonathan L. Anderson, Jackson Kelly PLLC, their attorneys; and Don L. Blankenship, et al., by Thomas V. Flaherty and Tammy R. Harvey, Flaherty Sensabaugh Bonasso PLLC, their attorneys, presented to the Court their joint written response to the petition seeking a preliminary injunction.

After carefully reviewing the documents in this case over the course of Memorial Day weekend, the Court met on Memorial Day, May 30, 2011, to extensively consider this matter.

The underlying case involves a shareholders' derivative action against current and former officers and directors of Massey Energy. This case does not involve direct claims by miners, widows or children arising out of the Upper Big Branch Mine disaster. The present dispute arises out of a proposed merger between two Delaware corporations. A similar class-action lawsuit is presently

pending in the Court of Chancery of Delaware. In the Delaware case, extensive discovery has been conducted, the parties have filed briefs, and the court has conducted hearings.

The petitioners request three types of relief from this Court. First, the petitioners ask that this Court “receive and consider” the record before the circuit court “and enter an order preliminarily enjoining the June 1, 2011, stockholder vote.” Second, the petitioners ask this Court to schedule the request for an injunction for a hearing before this Court prior to June 1, 2011. Third, petitioners ask that this Court establish a litigation trust to preserve the shareholders’ derivative claims against the respondents for the benefit of Massey Energy’s shareholders. Upon careful consideration of this matter, the Court is of the opinion that each of the petitioner’s prayers for relief must be denied.

This Court does not have jurisdiction to award an injunction in this matter. West Virginia Code 53-5-5 provides that: “When a circuit court, or a judge thereof, shall refuse to award an injunction, a copy of the orders entered in the proceedings in court, and the original papers presented to the court or to the judge in vacation with his order of refusal, may be presented to the supreme court of appeals, or a judge thereof in vacation, who may thereupon award the injunction.” The circuit court has not refused the petitioner’s request for an injunction. No hearing has been held and no order has been entered denying a preliminary injunction. In fact, a review of the record in this matter appears to indicate that the circuit court has not even granted leave to the petitioners to amend their complaint to *seek* injunctive relief, much less denied injunctive relief in an order. Rule of Civil Procedure 52(a) requires an order of a circuit court to contain specific findings of fact and conclusions of law. In the absence of an order there is simply nothing for this Court to review. State ex rel. McGraw v. Telecheck, 213 W.Va. 436, n.10, 582 S.E.2d. 885, n.10 (2003).

Furthermore, petitioner’s request for a hearing on an injunction before this Court is not appropriate, insofar as this Court is an appellate court. In addition, this Court does not have

jurisdiction to impose a litigation trust in a case such as this, where the circuit court has not conducted hearings, made findings of fact, or entered an order.

If this Court were to exercise jurisdiction, the petitioners also seek to require this Court to award relief against Alpha Natural Resources, Inc.—a corporation that is not named as a party and that is not even before this Court. The petitioners concede that Delaware corporate law governs this dispute. In contrast to the West Virginia action, *both* parties to the proposed merger are before the Delaware Chancery Court, which is recognized as having gained specialized expertise in disputes such as this one. The Delaware Court has the benefit of considerable discovery, has been able to review the briefs and has heard extensive argument as to the issues presented in this matter. Alpha Natural Resources is an indispensable party and must be named as a defendant before any court may act on a request for a preliminary injunction against it.

Upon consideration whereof, the Court is of opinion that the relief prayed for by the petitioners should be, and it hereby is, denied. Justice Davis and Justice Benjamin disqualified. This Court's decision does not preclude the parties and the circuit court from proceeding forthwith to conduct a hearing and fully consider this matter.

On May 25, 2011, likewise the petitioners, California State Teachers' Retirement System, et al., by A. Andrew MacQueen, their liaison counsel, presented to the Court their motion to seal the above-captioned matter.

On May 27, 2011, the respondents, Dan R. Moore, et al., by A.L. Emch and Jonathan L. Anderson, Jackson Kelly PLLC, their attorneys; and Don L. Blankenship, et al., by Thomas V. Flaherty and Tammy R. Harvey, Flaherty Sensabaugh Bonasso PLLC, their attorneys, presented to the Court their joint response in support of the motion to seal.

Also on May 27, 2011, National Public Radio Inc. and The Daily Gazette Company, by Rudolph L. DiTrapano and Sean P. McGinley, DiTrapano Barrett & DiPiero, PLLC, their attorneys, presented to the Court their motion in writing to intervene for the limited purpose of responding to said motion, and attached their response thereto. Upon consideration whereof, the Court is of the opinion to and does hereby permit intervention for the sole and limited purpose of responding to the motion to seal.

Upon further consideration whereof, the Court is of opinion to and doth hereby refuse said motion to seal in part. The Court is of the opinion that the petition and response are not confidential. It is hereby ordered that the *Emergency Petition for a Preliminary Injunction Pursuant to West Virginia Code, Section 53-5-5* and *Joint Response to Emergency Petition for A Preliminary Injunction Pursuant to West Virginia Code Section 53-5-5* are not confidential documents and shall be available to the public.

The Court has further reviewed the motion to seal the appendices submitted in support of the petition and response in light of the requirements of Rule 40, Rev. R.A.P. In the absence of findings of fact and conclusions of law by the lower court, this Court is not able to determine what, if any, portion of the appendices was determined to be confidential by the lower tribunal—or any other tribunal—or what if any portions of the appendices are currently subject to a protective order. Likewise, the Court is not able to determine from a review of the documents contained in the appendices whether they have been disclosed pursuant to any confidentiality agreement. The Court therefore cannot properly consider the motion to seal the appendices submitted by the parties, until the circuit court makes findings of fact and conclusions of law. Therefore, the documents submitted as the appendices in this matter shall remain confidential until further order. Justice Davis and Justice Benjamin disqualified.

It is finally ordered that this matter be, and it hereby is, dismissed from the docket of this Court.

Service of an attested copy of this order shall constitute sufficient notice of the contents herein.

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court

