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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 5, 2017 Session

GILBERT HEREDIA ET AL. v. BILL GIBBONS ET AL.

Appeal from the Chancery Court for Davidson County
No. 15-976-III Ellen Hobbs Lyle, Chancellor

No. M2016-02062-COA-R3-CV

The plaintiffs, some of whom had an interest in property that had been subject to forfeiture proceedings, filed a quo warranto action alleging misconduct by public officials in the administration of the proceedings. The plaintiffs also sought declaratory relief and judicial review "from each final judgment of forfeiture during the period permitted by Tennessee law." On The defendants' motion, the trial court dismissed the case on various grounds, including lack of subject matter jurisdiction and lack of standing. In the case of one plaintiff, we conclude that the court lacked subject matter jurisdiction to entertain a petition for judicial review. We further conclude that the plaintiffs either failed to state a claim upon which relief could be granted or lacked standing to pursue the claims. So we affirm the dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Herbert S. Moncier and Mike Whalen, Knoxville, Tennessee, for the appellants, Gilbert Heredia, Fonda Gross, Gordon Groves, Danny Cardwell, Michael Price, Brian Price, Herbert Sanford Moncier, and Mike Whalen.

Herbert H. Slatery III, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; and Michael A. Meyer, Special Counsel Law Enforcement & Special Prosecutions Division, Tennessee, for the appellees, Tennessee Department of Safety and Homeland Security, Tre Hargett, Joe R. Bartlett, William L. Gibbons, and Deborah Martin.

John M. Gillum and Justin D. Wear, Nashville, Tennessee, for the appellee, Fidelity & Deposit Company of Maryland.

OPINION

I.

As observed by the Chancery Court for Davidson County, Tennessee, the many filings in this case resulted in a nearly "incomprehensible record and pleadings." So rather than recount the procedural history, we begin our review of this dismissal under Tennessee Rule of Civil Procedure 12 with the "Amended Complaint," which was styled as follows:

> STATE OF TENNESSEE, in the name of Davidson County District Attorney General Glenn R. Funk, on relationship of Gilbert Heredia; Fonda Gross; Gordon Groves; Danny Cardwell; Brian Price; and Michael Price as Claimants, Relators and Class Representatives; and Herbert S. Moncier; David L. Raybin; Benjamin K. Raybin; and Mike Whalen as Attorney-Relators,
>
> Plaintiffs,
>
> v.
>
> BILL GIBBONS, individually; DEBRA MARTIN, individually; JOE R BARLETT [sic], individually; JOHN AND JANE DOE, as a Class of officers and employees of the State of Tennessee covered by Tennessee's blanket surety bond; and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, surety for Defendants Gibbons, Martin, and Tennessee John and Jane Doe officers and employees; TRE HARGETT, Tenn. Code Ann. § 29-14-207 interested party for the Administrative Procedures Division; TENNESSEE DEPARTMENT OF SAFETY,
>
> Defendants.

Like so much in this case, even the style requires a bit of explanation.

The plaintiff relators filed suit in the name of the State of Tennessee by the District Attorney General for the 20th Judicial District Glenn R. Funk to rectify allegedly unlawful acts, "acts of nonfeasance, misfeasance, and malfeasance," being committed by officers and employees of the State of Tennessee. According to the plaintiff relators, "[f]or many years, Commissioners of the Tennessee Department of Safety; their Designees; and state employees under their supervision, ha[d] unlawfully exercised their offices by failing to faithfully perform their duties by forfeiting property without complying with the requirements of Tennessee forfeiture statutes and the Tennessee

Constitution." Although District Attorney General Funk was listed in the style of the Amended Complaint, shortly after the suit was initially filed, he filed a "notice to all parties that he [wa]s not willing to serve as the plaintiff in this case." Plaintiff relators Gilbert Heredia, Fonda Gross, Gordon Groves, Danny Cardwell, Brian Price, and Michael Price each had property seized by the State and either had participated in or were participating in forfeiture proceedings. Plaintiff relators Herbert S. Moncier, David L. Raybin, Benjamin K. Raybin, and Mike Whalen are attorneys who had represented individuals in forfeiture cases.

According to the Amended Complaint, several forfeiture proceedings had been dismissed by administrative law judges as a result of the failure of either the seizing agency or the Tennessee Department of Safety and Homeland Security (the "Department") to follow required procedures. And the Department and its employees had made it "as difficult and as expensive as possible for the Claimants to obtain return of their property." The dismissed proceedings included some in which plaintiff relators participated.

In addition, plaintiff relator Herbert Moncier claimed that, in connection with his representation of plaintiff relators Groves and the Prices, he discovered that in other forfeiture cases the Department did not comply with statutory or constitutional requirements. Among other things, he faulted the Department for not "present[ing] affirmative proof that it ha[d] complied with both the procedural and the substantive requirements in the forfeiture statutes enacted by our Legislature" as required by *State v. Sprunger*, 458 S.W.3d 482, 499-50 (Tenn. 2015). Mr. Moncier had attempted to intervene in these other forfeiture cases, but his efforts had been frustrated, primarily it seems due to the fact that he had no client in the other cases. Mr. Moncier complained that the Department would not provide him with the addresses of unrepresented claimants whose property had been seized.[1]

The plaintiffs claimed relief under the quo warranto statute, Tennessee Code Annotated § 29-35-101 (2012), because the officials of the Department were allegedly unlawfully exercising the authority of their offices and violating their oaths of office. So, along with the Department, the plaintiffs named as defendants the Commissioner of the Department Bill Gibbons and his subordinates, some of whom were unknown and denominated as "John and Jane Does." The plaintiffs also claimed to be beneficiaries of the official bonds of the public officials named and sued Fidelity & Deposit Company of Maryland, allegedly "as surety for each John and Jane Doe state officer or employee covered by the . . . surety bond." *See* Tenn. Code Ann. § 8-19-101 (2016). Finally, the plaintiffs named Tennessee Secretary of State Tre Hargett as a defendant "because he has

[1] Undeterred, Mr. Moncier sought to obtain the forfeiture case files through a Tennessee Public Records Act request. *See Moncier v. Harris*, No. E2016-00209-COA-R3-CV, 2018 WL 1640072, at *1 (Tenn. Ct. App. Apr. 5), *perm. app. denied*, (Tenn. Aug. 10, 2018).

an interest in supervising the Administrative Procedures Division in the manner forfeitures are carried out."

In addition to the quo warranto action and suit on the official bond, the plaintiffs sought declaratory relief, posing several separate questions for resolution by the court. Two of the questions related to a footnote appearing in an administrative order in a forfeiture case and whether it represented a correct statement of the law. The remaining questions related to the manner in which forfeiture proceedings were being carried out, whether claimants in contested forfeiture cases could recover attorney's fees, whether prior forfeitures were void, and the enforceability of settlement agreements entered into between the Department and claimants.

The plaintiffs posed the questions on behalf of themselves and proposed classes of individuals. The class action component of the suit would have been on behalf of individuals who had participated in a forfeiture proceeding during various time periods, including those who had settled their cases with the Department and those whose property had been seized by entities other than the Department. In addition to declaratory relief, the plaintiffs sought recovery of attorney's fees and, in the case of those with ongoing forfeiture proceedings, the plaintiffs sought "return of all property . . . along with any prepaid costs and without charges for storage or other expenses."

Finally, the plaintiffs sought judicial review "from each final judgment of forfeiture during the period permitted by Tennessee law." The plaintiffs sought judicial review on their own behalf in some cases[2] and on behalf of the class members.

The State of Tennessee moved to dismiss under Tennessee Rules of Civil Procedure 12.02(1) and (6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. More specifically on the question of standing, the State asserted dismissal was appropriate for the following reasons:

> 1. Plaintiffs and Attorney Relators do not have standing to bring a *quo warranto* action because the District Attorney General has not authorized the Plaintiffs and Attorney Relators to proceed with the *quo warranto* in his name.
>
> 2. "Class members" lack standing as they are unidentified, their only available method of judicial review is pursuant to Tenn. Code Ann. § 4-5-

[2] The Amended Complaint alleged that the order in the forfeiture case involving Mr. Heredia became final on July 17, 2015. Mr. Groves filed a separate action for judicial review. *See Groves v. Tenn. Dep't of Safety & Homeland Sec.*, No. M2016-01448-COA-R3-CV, 2018 WL 6288170 (Tenn. Ct. App. Nov. 30, 2018), *perm. app. denied*, (Tenn. May 16, 2019).

322, they have not exhausted their remedies at the agency level, and their claims are barred under the doctrine of *res judicata* or prior suit pending.

3. Attorney Relators lack third-party standing because their classes of unnamed "clients" are hypothetical and Attorney Relators do not allege a special injury.

4. Named class representatives lack standing as their claims are barred under the doctrine of *res judicata* or prior suit pending.

The chancery court entered a memorandum and order granting the motion to dismiss. The court relied on several grounds for the dismissal: lack of subject matter jurisdiction, lack of standing, mootness, prior suit pending, collateral estoppel, res judicata, retroactive application sought, and abstract/hypothetical/advisory decision sought. From this ruling, plaintiffs Gilbert Heredia, Fonda Gross, Gordon Groves, Danny Cardwell, Brian Price, Michael Price, Herbert S. Moncier, and Mike Whalen filed an appeal. Plaintiffs David L. Raybin and Benjamin K. Raybin elected not to appeal. For purposes of this opinion, "Appellants" refers only to those plaintiffs who have appealed while "the plaintiffs" refers to Appellants along with the Raybins, unless the context indicates otherwise.

II.

On appeal, Appellants raise twelve issues, all of which relate to the question of standing. Lack of standing may be raised as a defense under Rule 12.02(6) of the Tennessee Rules of Civil Procedure. *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976). A Rule 12.02(6) motion, also known as a motion to dismiss for failure to state a claim upon which relief can be granted, "challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). Thus, "[t]he resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone." *Id.* By filing a motion to dismiss, the defendant "admits the truth of all of the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action." *Leach v. Taylor*, 124 S.W.3d 87, 90 (Tenn. 2004); *see also Webb*, 346 S.W.3d at 426; *Brown v. Tenn. Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn. 2010); *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 516 (Tenn. 2005). When a complaint is challenged by a Rule 12.02(6) motion, the complaint should not be dismissed unless it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief. *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999) (citing *Riggs v. Burson*, 941 S.W.2d 44, 47 (Tenn. 1997)).

As an initial matter, Appellants argue that they pleaded "twelve (12) . . . reasons for standing" and that the chancery court was required to "take those averments as true

for the purposes of [the] Rule 12.02(6) motion to dismiss." But "[t]he issue of whether a party has standing is a question of law." *Massengale v. City of East Ridge*, 399 S.W.3d 118, 123 (Tenn. Ct. App. 2012); *see State ex rel. Watson v. Waters*, No. E2009-01753-COA-R3-CV, 2010 WL 3294109, at *3-4 (Tenn. Ct. App. Aug. 20, 2010) (rejecting argument that "the trial court erred when it dismissed the plaintiffs' complaint for lack of standing when the complaints alleged standing pursuant to Tenn. Code Ann[.] § 29-35-110; standing as public-spirited citizens pursuant to *Bennett v. Stutts*; Plaintiff['s] . . . special interest standing as a county commissioner; and standing as local taxpayers" (citation omitted)). While "[w]e are required to construe the allegations of the complaint in plaintiff's favor, and accept the allegations of fact as true," the same is not true for "inferences to be drawn from the facts or legal conclusions set forth in the complaint." *Nat'l Gas Distribs. v. Sevier Cty. Util. Dist.*, 7 S.W.3d 41, 43 (Tenn. Ct. App. 1999). Our review of a trial court's determinations on issues of law is de novo with no presumption of correctness. *Doe*, 2 S.W.3d at 922 (citing *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997)).

A. QUO WARRANTO

The trial court concluded that the plaintiffs lacked standing to proceed with the quo warranto action without the district attorney general's participation. Appellants argue, among other things, that they had standing under Tennessee Code Annotated § 29-35-110, which they contend grants private citizens statutory standing to sue for public wrongs by public officials. Appellants also argue that *Bennett v. Stutts*, 521 S.W.2d 575 (Tenn. 1975), established "judge made public-spirited standing," which they submit is also applicable. We disagree.

Quo warranto is a common law remedy codified at Tennessee Code Annotated § 29-35-101. *Jordan v. Knox Cty.*, 213 S.W.3d 751, 765 n.5 (Tenn. 2007); *State ex rel. Wallen v. Miller*, 304 S.W.2d 654, 658 (Tenn. 1957) ("In Tennessee we have statutory provisions defining the use of quo warranto and indicating in what cases and upon what grounds it will lie . . . ."); *State ex rel. DeSelm v. Knox Cty. Comm'n*, 342 S.W.3d 1, 6 (Tenn. Ct. App. 2010). The statute provides that "[a]n action lies in the name of the state against the person . . . offending . . . [w]henever any person unlawfully holds or exercises any public office or franchise within this state."[3] Tenn. Code Ann. § 29-35-101(1).

Generally, a quo warranto action is "brought *by* the attorney general for the district or county." *Id.* § 29-35-109 (2012) (emphasis added); *see Country Clubs, Inc. v. City of Knoxville*, 395 S.W.2d 789, 793 (Tenn. 1965) ("[A] suit in the nature of a quo warranto

[3] In the Amended Complaint, the plaintiffs also cited Tennessee Code Annotated § 29-35-102, but "that section pertains only to the affairs of public or charitable *corporations*." *State ex rel. Jones v. Burnett*, 760 S.W.2d 629, 630 n.1 (Tenn. 1988) (emphasis added).

. . . must be brought in the name of the State by the District Attorney General."). Suit may also be brought "on the information of any person, upon such person giving security for the costs of the proceedings." *Id.* § 29-35-110(a) (2012). And "[w]hen the suit is brought at the relation of a private individual, it shall be so stated in the bill and proceedings, and such individual is responsible for costs in case they are not adjudged against the defendant." *Id.* § 29-35-110(b).

Despite Appellants' contention otherwise, section 29-35-110 does not authorize private individuals to bring suit in the nature of a quo warranto proceeding.[4] *See, e.g.*, *State ex rel. Wallen*, 304 S.W.2d at 659 (explaining that in a quo warranto proceeding "the Attorney General must join with the relators"); *Jones v. Talley*, 230 S.W.2d 968, 971 (Tenn. 1950) (holding that suit should be dismissed when a proceeding in the nature of quo warranto "was not instituted in the name of the State by the District Attorney General"); *Weaver v. Maxwell*, 224 S.W.2d 832, 832-33 (Tenn. 1949) (holding that suit in the nature of a quo warranto "must be brought by the Attorney General for the district or county" and that "the provisions of the declaratory judgment law do not dispense with this requirement"). The statute provides that suit may be brought "*on the information of* any person" and "*at the relation of* a private individual," not that suit may be brought *by* a private individual alone. Tenn. Code Ann. § 29-35-110(a), (b) (emphasis added). In *Bennett*, our supreme court reiterated "that private citizens . . . cannot maintain an action complaining of the wrongful acts of public officials *unless such private citizens aver special interest or a special injury not common to the public generally*." 521 S.W.2d at 576 (emphasis added).

Based on the holding in *Bennett*, Appellants argue that the case "created a judicial exception to the judge made standing requirements for public-spirited citizens." According to Appellants, "[f]or individuals without a special interest or special injury, or who do not bring the action as a private individual pursuant to § 29-35-110, *Bennett v. Stutts* created [certain] procedures for public spirited citizens to have standing."

We have previously rejected Appellants' argument as inconsistent with *Bennett*. As we explained:

> *Bennett's* reference to the district attorney general is simply a recognition of the unique role of the attorney general in suits of this nature. However, despite this unique role, *Bennett* makes clear that the attorney general cannot "act arbitrarily or capriciously" or "be guilty of palpable abuse of his discretion in declining to" pursue or allow such a suit to be pursued in

[4] Plaintiffs cite *State v. Thompson*, 246 S.W.2d 59 (Tenn. 1952), arguing that the individual citizens in that case were able to "sue[] in the name of the State of Tennessee and the District Attorney" despite not having "common law special interest or injury that was not common to all members of the municipality." But in *Thompson*, the district attorney general actually participated in the case. *Id.* at 60.

> the attorney general's name. *Bennett* does *not* expressly say that the failure to act of a recalcitrant attorney general will, *ipso facto*, convert a plaintiff, *without standing in the traditional sense*, into a plaintiff with standing. In the absence of such an express holding . . . , we conclude that the failure of an attorney general to act or allow his or her name to be used, simply means that the attorney general's preeminent role in this area will give way to a *plaintiff with standing*.

State ex rel. DeSelm v. Owings,, 310 S.W.3d 353, 359 (Tenn. Ct. App. 2009) (citations omitted); *see also Thomas v. Lee*, 384 S.W.3d 726, 730 (Tenn. Ct. App. 2012) ("*Bennett* . . . did not establish an exception to the rule requiring a special interest or injury; it only established an exception to the rule that a *quo warranto* proceeding must be pursued by the Attorney General. Indeed, the plaintiffs in *Bennett v. Stutts* were not permitted to proceed under the *Bennett* exception *because* they lacked standing.").

Alternatively, Appellants insist that they alleged special interests and injuries sufficient to confer standing. A standing analysis focuses on the party, rather than the merits of the claim. *Metro. Air Research Testing Auth., Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992). Even so, the standing inquiry "often turns on the nature and source of the claim asserted." *Id.* While "a plaintiff must show a distinct and palpable injury" as a threshold matter, a plaintiff must also show "a causal connection between the claimed injury and the challenged conduct" and that "the alleged injury is capable of being redressed by a favorable decision of the court." *Am. Civil Liberties Union v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006).

The plaintiffs who had or were participating in forfeiture proceedings claimed injuries that were not capable of being redressed by a favorable decision of the court. These injuries included damages for deprivation of the use of their property, interest on money seized, and attorney's fees. But under the quo warranto statute, the only remedies prescribed for "usurping, unlawfully holding, or exercising any office" are to "exclude[] [the defendants] from the office . . . , and that defendant[s] pay the costs." Tenn. Code Ann. § 29-35-116 (2012); *cf. State v. Morgan*, No. 03A01-9408CH00300, 1995 WL 137287, at *1 (Tenn. Ct. App. Mar. 30, 1995) ("[A] proceeding against a public officer to determine whether he is eligible to hold the office is not a suit against an officer in his official capacity, but is a challenge to her personal right to hold the office and, the challenger is not responsible for the attorney's fees incurred by the office-holder who is removed from office. Nor is there any statutory provision authorizing an award of fees incurred by the individual removed from office.").

While not available in a quo warranto action, Appellants submit that the plaintiffs who had or were participating in forfeiture proceedings have standing to recover attorney's fees under Tennessee Code Annotated § 4-5-325, which authorizes an award of attorney's fees in cases where a state agency issues a "citation." Tenn. Code Ann. §

4-5-325(a) (2015). To the extent the statute is even applicable in the context of a forfeiture proceeding, the remedy is only available in a contested case hearing or in an appeal of a final decision in a contested case. *See id.* § 4-5-325(a), (b) (authorizing "the hearing officer or administrative law judge" or the judge after judicial review of "a final decision in a contested case hearing" to order the agency to pay the reasonable expenses incurred, including attorney's fees).

Appellants also argue that the plaintiffs who had participated in forfeiture proceedings and recovered their seized property had standing because they were denied complete relief in their forfeiture cases. Under Tennessee Code Annotated § 40-33-215, "[a] person who has property seized [has] . . . a cause of action against the seizing agency if the seizing officer acted in bad faith in seizing or failing to return property seized." *Id.* § 40-33-215(a) (2018). Appellants contend that these plaintiffs "only received partial relief (the return of their property)" in the forfeiture case because they were not permitted to pursue their cause of action for damages under Tennessee Code Annotated § 40-33-215. This argument fails, however, because nothing in Tennessee Code Annotated § 40-33-215 requires the cause of action to be asserted in the forfeiture case.

The plaintiffs who are attorneys that have represented claimants in forfeiture cases plainly lack a distinct and palpable injury. They claimed a special interest stemming from their "duties required of them by the Tennessee Supreme [C]ourt pursuant to their licenses to practice law, for which they took an oath to perform." They also claimed a special interest arising from their ethical obligations under the Tennessee Rules of Professional Conduct. *See* Tenn. Sup. Ct. R. 8. These duties and obligations do not create a sufficient personal stake or interest to confer standing on the plaintiff-attorneys. *See Reguli v. Guffee*, No. M2015-00188-COA-R3-CV, 2016 WL 6427860, at *3 (Tenn. Ct. App. Oct. 28, 2016) (holding attorney seeking video recording of juvenile court proceedings lacked "a sufficient personal stake or interest in the outcome of the litigation to confer standing"); *Johnston v. Swing*, No. M2012-01760-COA-R3-CV, 2013 WL 3941026, at *6 (Tenn. Ct. App. July 26, 2013) (finding attorney lacked standing to challenge a rule prohibiting him from speaking on behalf of clients during meetings of the Parks and Recreation Board).

Appellants lacked standing to bring the quo warranto action in their own names. As such, the district attorney general's participation was required. Because the district attorney general declined to participate, the chancery court appropriately dismissed the quo warranto action for lack of standing.

B. BOND CLAIM

We also conclude that Appellants lacked standing to pursue their claim on any "public official bond" or a "blanket surety bond." Even assuming that Fidelity & Deposit

Company of Maryland issued such a bond or bonds,[5] the bonds are "payable to the state." Tenn. Code Ann. §§ 4-4-108(b) (2015), 8-19-111(a) (2016). Here, the State is not seeking recovery.

C. DECLARATORY JUDGMENT

The plaintiffs also sought to proceed under the Declaratory Judgments Act, submitting several "questions" to the court. The Act provides as follows:

> [a]ny person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Tenn. Code Ann. § 29-14-103 (2012). Still "some real interest must be in dispute." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 838 (Tenn. 2008) (citing *Goetz v. Smith*, 278 S.W. 417, 418 (Tenn. 1925)). To establish standing under the Act, "the person seeking a declaratory judgment must allege facts which show he has a real, as contrasted with a theoretical, interest in the question to be decided and that he is seeking to vindicate an existing right under presently existing facts." *Burkett v. Ashley*, 535 S.W.2d 332, 333 (Tenn. 1976).

We conclude dismissal of the declaratory judgment action was also appropriate for lack of standing. Here, Appellants' claim for declaratory relief partially centered on a footnote to an order entered on a petition for reconsideration in a civil forfeiture case. *See* Tenn. Code Ann. § 4-5-317 (2015). According to Appellants, the Department and its officers and employees relied on this footnote to "continue to pursue forfeitures." But the plaintiffs were not parties to the forfeiture proceeding in which the order was entered. While the Department might rely on the footnote as precedent in other forfeiture cases, the claimants in those cases are the proper parties to challenge the Department's reliance on the footnote.

As to the remaining questions, including the "additional and supplemental questions," posed in the Amended Complaint, we conclude dismissal was also appropriate. The remaining questions are abstract or theoretical, relating to the general legality of actions taken by the Department and its officers and employees in forfeiture proceedings. Questions that are "abstract, theoretical or based on a contingency which

[5] In its answer, Fidelity & Deposit Company of Maryland claimed that it issued "a Government Crime Policy" rather than a "public official bond" or a "blanket surety bond."

may or may not arise" are not appropriate for declaratory judgment. *State ex rel. Lewis v. State*, 347 S.W.2d 47, 49 (Tenn. 1961).

D. JUDICIAL REVIEW

Finally, Appellants argue that the chancery court erred in dismissing their petitions for judicial review "pursuant to Tenn. Code Ann. § 4-5-322 from each final judgment of forfeiture during the period permitted by Tennessee law." Tennessee Code Annotated § 4-5-322 provides for judicial review of agency decisions in contested cases. *See* Tenn. Code Ann. § 40-33-213(b) (2018) (providing that appeal of the decision in a forfeiture proceeding "shall be conducted in the same manner as is provided in § 4-5-322"). Persons aggrieved by a final decision of an administrative agency must file their petitions for review within sixty days after the entry of the agency's final order. *Id.* § 4-5-322(b)(1)(A) (Supp. 2018).

We conclude that the chancery court lacked subject matter jurisdiction over the request for judicial review by plaintiff Cardwell. "A party's failure to file a petition for review on or before the statutory deadline prevents the courts from exercising their jurisdiction to review the agency's decision." *Davis v. Tenn. Dep't of Emp't Sec.*, 23 S.W.3d 304, 307-08 (Tenn. Ct. App. 1999). According to the Amended Complaint, Mr. Cardwell settled his claim to seized monies, and the Department entered an order returning the funds on February 21, 2015. Because the original complaint, filed on August 13, 2015, was filed more than sixty days after entry of the final judgment, the court lacked subject matter jurisdiction to consider Mr. Cardwell's request for judicial review.

We conclude that res judicata barred the request of Plaintiff Gross for judicial review. Res judicata may be raised in the context of a motion to dismiss for failure to state a claim upon which relief can be granted but only in specific circumstances.

> For a Tenn. R. Civ. P. 12.02(6) motion to be used as a vehicle to assert an affirmative defense, the applicability of the defense must "clearly and unequivocally appear[] on the face of the complaint." In other words, the plaintiff's own allegations in the complaint must show that an affirmative defense exists and that this defense legally defeats the claim for relief.

Jackson v. Smith, 387 S.W.3d 486, 491-92 (Tenn. 2012) (citations omitted). Here, the res judicata defense appears clearly and unequivocally. The Amended Complaint alleged that Ms. Gross "took the lead as the Plaintiff in the case of *Harmon v. Jones*," No. E2010-02500-COA-R3-CV, 2012 WL 3291792 (Tenn. Ct. App. Aug. 14, 2012), *abrogated by State v. Sprunger*, 458 S.W.3d 482 (Tenn. 2015). It further alleged that "*Harmon v. Jones* upheld the right of the Department of Safety to proceed with administrative forfeiture of her property without complying with Tennessee's forfeiture

statutes." Although *Harmon v. Jones* may have been "superseded" by other precedent as Appellants claim, res judicata still applies to bar Ms. Gross's request for further judicial review.

As for Plaintiffs Brian Price and Michael Price, the chancery court noted that the forfeiture cases in which they were involved were still pending at the time the Amended Complaint was filed. As a result, they lacked standing to pursue judicial review. Judicial review is only available from a "final decision in a contested case," and then only to a party that is "aggrieved." *See* Tenn. Code Ann. § 4-5-322(a)(1).

To the extent Appellants seek to pursue judicial review on behalf of classes of previous claimants to seized property, we agree with the chancery court that Appellants lacked standing. The Amended Complaint concedes some of these classes of individuals had counsel in their administrative forfeiture proceedings. But more importantly, the judicial review statute specifies that it is only "[a] person who is aggrieved by a final decision in a contested case [that] is entitled to judicial review." *Id.*

III.

Based on the foregoing reasons, we affirm the dismissal of the Amended Complaint. This case is remanded to the chancery court for such further proceedings as may be necessary and consistent with this opinion.

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W. NEAL MCBRAYER, JUDGE