

**KENTUCKY REGISTRY OF ELECTION FINANCE
NO. 2009-66**

**IN RE: KATHRYN R. KING, JAMES O. KING, JR.,
and KING SOUTHERN BANK**

**RESPONSE TO MOTION FOR DISQUALIFICATION
OF ALL MEMBERS OF THE REGISTRY**

Complainant has filed an unprecedented – and unfounded – motion to disqualify all 7 members of the Registry from participating in the investigation and determination of this matter. Complainant’s motion to disqualify the members of the Registry must be denied for three separate reasons: (1) Complainant is not a party to this investigation and has no standing to make the motion for disqualification; (2) KRS 13B.020 expressly exempts the Kentucky Registry of Election Finance from the provisions of Chapter 13B, the statute on which the motion is predicated; and (3) the factual and legal bases of the motion are completely without merit.

Discussion

1. Complainant has no standing because he is not a party to this investigation.

This is not a civil litigation between two litigants. Instead, this is a law enforcement proceeding by the Registry pursuant to its statutory authority to investigate, conciliate¹ and prosecute alleged violations of campaign finance law. KRS 121.140(1) both empowers the

¹ The Registry alone may impose civil sanctions for non-criminal violations of campaign finance law. *Democratic Party of Kentucky v. Graham*, 976 S.W.2d 423, 430 (Ky. 1998). Because KRS 121.140 gives only the Registry the power to enter into a conciliation agreement that may impose civil penalties, this disqualification motion is nothing more than a stratagem to preclude the Registry from negotiating such an agreement with Respondents. Complainant is instead attempting to have this matter referred to a law enforcement officer whose jurisdiction under KRS 121.140 is limited to treating it as a felony prosecution. This is contrary to the purpose-and plain language-of KRS 121.140. Further, even if the Registry were disqualified from this investigation, as the agency with the exclusive jurisdiction to negotiate a conciliation agreement with Respondents and impose civil penalties upon them, it would be required to proceed with its investigation under the rule of necessity, as enunciated by the United States Supreme Court in *Evans v. Gore*, 253 U.S. 245 (1920). See *Carter v. Craig*, 574 S.W.2d 352, 355 (Ky. Ct. App. 1978).

Registry to initiate investigations of alleged violations of KRS Chapter 121 “on its own initiative” and commands the Registry to investigate alleged violations “[u]pon the sworn complaint of any person.”

While Mr. Springston precipitated the Registry’s investigation into this matter by filing a complaint with the Registry pursuant to KRS 121.140(1) and 32 KAR 2:030, he has never been a party to this investigation. Like a prosecutor giving information to the complaining witness in a criminal investigation, the Registry’s General Counsel may choose to give him information from time to time as a matter of courtesy, but he has no statutory (or other) right to the status of a party in this matter. This investigation is the province of the General Counsel, and action upon her recommendation is the province of the Registry members. Mr. Springston is not a “party” to either phase of this proceeding.

Mr. Springston attempts to avoid this glaring problem by alleging in footnote 3 to his motion that the Registry’s general counsel “conferred intervenor status” upon him, referencing his Exhibit B. Aside from the fact that the Registry staff does not have the statutory authority to grant “intervenor” status, Complainant’s Exhibit B is actually a letter from Emily Dennis, General Counsel for the Registry, informing Complainant that his Request to Consolidate Findings of Fact and Motion to Compel were not authorized by the statutes and regulations of the Registry and were therefore denied.

While Ms. Dennis did not explicitly state as such in her letter, Mr. Springston had no right to file those documents because KRS 121.140 does not give a complainant any right to further pursue a matter once he or she files a complaint with the Registry. The unpublished Court of Appeals opinion in *Schroering v. Kentucky Registry of Election Finance*, No. 95-CA-0545-MR, 1996 WL 76126 (Ky. Ct. App. Feb.23, 1996) (attached hereto as Exhibit A), is

instructive on this issue. In *Schroering*, two individuals who had filed complaints with the Registry attempted to appeal the Registry's conciliation agreement with the alleged violator to Franklin Circuit Court. *Id.* at 2. The circuit court concluded that the complainants were not parties to the Registry proceeding, and lacked standing to appeal the Registry's decision. The Court of Appeals affirmed. *Id.*

The Court of Appeals adopted Judge William Graham's well reasoned opinion, and stated that KRS 121.140 simply provides a process by which complainants may bring alleged violations of campaign finance law to the Registry. Thereafter, the complainant is not a party to any ensuing proceeding. *Id.* at 5. KRS 121.140 only gives rights to the alleged violator and the Registry, while giving all powers of investigation to the Registry. *Id.* KRS 121.140(4) does provide that the complainant be given informational notice of the hearing to be held if the alleged violator does not accept the conciliation agreement, but the statute provides no role for the complainant in that hearing. *Id.* The Court therefore expressly held that KRS 121.140(6) does not authorize the complainant to appeal the disposition of the case by the Registry, because the complainant is not a party to the Registry proceeding.

The Court correctly analogized the role of a complainant to that of a victim in a criminal proceeding. *Id.* at 5-6. While "the victim of a crime brings the alleged violation of the law to the Commonwealth...the alleged violation of law is considered as a crime against the people as a whole." *Id.* at 6. The victim has no right to pursue separate criminal charges or appeal a lack of conviction. *Id.* Similarly, once a complainant brings forward charges of an alleged violation of campaign finance law, the alleged violation becomes a matter between the Commonwealth and the alleged violator, and the complainant has no right to control the Commonwealth's handling of the case or individually appeal its outcome. *Id.* Mr. Springston's claim – without citation to

any authority – that he has a “property right” in the outcome of this investigation is wide of the mark. In fact, a party has no private right of action unless a statute creates those private rights. *Gonzaga Univ. v. Doe* 536 U.S. 273, 283-84 (2002). Because KRS 121.140 grants no private rights to any individuals in Registry investigations Mr. Springston has no private right of action here.

For these reasons, Mr. Springston is not a party to this Registry investigation and therefore has no standing to pursue this motion for disqualification. The motion must therefore be denied.

2. KRS 13B.020 exempts the Registry from the provisions of Chapter 13B.

Complainant’s alleged statutory basis for his motion is KRS 13B.040(2), which states that any “party” to a case before an agency may request the disqualification of a “hearing officer” by filing an affidavit stating the grounds upon which he claims that a fair and impartial hearing cannot be accorded. But KRS Chapter 13B does not apply to campaign finance hearings conducted by the Registry. In fact, KRS 13B.020(2)(f) expressly states that the provisions of Chapter 13 do not apply to the Registry of Election of Finance and campaign finance hearings conducted pursuant to KRS Chapter 121. Because the Registry is expressly exempted from the statutory provisions on which he relies, Complainant’s motion must be denied.

3. Complainant’s underlying claims are without merit.

The entire basis of Mr. Springston’s motion for disqualification of all 7 members of the Registry is the spurious contention that the Registry members are all “likely to be a material witness for Respondents in the proceeding.” Complainant’s argument is simply untrue. Even if this matter is not resolved with a conciliation agreement, not one member of the Registry would be a witness for the Respondents at any hearing pursuant to KRS 121.140(4).

Respondents argue that Mr. King had an absolute legal right, pursuant to KRS 501.070(3)(d) and *Walker v. Commonwealth*, 127 S.W.3d 596 (Ky. 2004), to rely upon the advice he received from Registry staff member Jan Hines when deciding whether to make a gift to his daughter. Mr. King inquired of the Registry via email on July 18, 2008 whether he could make an unconditional gift of cash in excess of \$1,000 to his daughter knowing that the daughter might then contribute the money to her own campaign. On July 21, 2008, Registry staff member Jan Hines replied to Mr. King's inquiry via email stating: "The Registry does not regulate the private finances of a candidate." In good faith, Mr. King (and his counsel) interpreted that response as stating that the gift would not violate KRS Ch. 121.

KRS 501.070(3)(d) expressly provides that an individual may rely upon an interpretation of a statute received from the agency "with responsibility for the interpretation, administration or enforcement of the law defining the offense," even if the advice was mistaken. In *Walker v. Commonwealth*, 127 S.W.3d 596, 608 (Ky. 2004), the Kentucky Supreme Court squarely held that KRS 501.070(3)(d) sets forth "a subjective standard," not "an objective standard" *Id.* The *Walker* Court held that if a person "'actually believed' that his actions were authorized by" the interpretation he received from the agency, then the actions in question do not violate the law. *Id.* Accordingly, even if the advice from the Registry were mistaken – which it was not – any ensuing gift from Mr. King to Judge King could not be a violation of any provision of KRS Chapter 121.

Complaint makes the convoluted argument that Respondents must call each member of the Registry as "material witnesses" in order to prove that Ms. Hines' e-mail accurately stated he

Registry's interpretation of the statute.² This is incorrect. Should this matter reach the KRS 121.140(4) hearing stage, the issue would be Mr. King's subjective good faith reliance on Ms. Hines' advice, not whether her advice accurately stated either the law or the Registry's interpretation of the law. Respondents would not need to call a single witness from the Registry or its staff to prove that defense. Respondents would merely put the e-mail chain into evidence, inasmuch as it is indisputably authentic, and call Mr. King to testify to his good faith reliance upon it.

KRS 501.070(3)(d) permits a person to act upon a mistaken belief of law founded upon an "official statement of law" contained in "an official interpretation of the public officer or body of charged by law with responsibility for the interpretation, administration, or enforcement of the law defining the offense." Even if the agency's advice misstated the law, reliance upon that advice in subjective good faith is a complete defense. Therefore, the only evidence Respondents need produce in support of their mistake of law defense is the "official statement of the law," upon which Mr. King relied, namely, the July 21, 2008 email from Ms. Hines.

Complainant also makes the contradictory argument that the Registry must disqualify itself because "its impartiality might reasonably be questioned on the basis of appearance of impropriety." Complainant appears to argue that Ms. Hines' statement in her July 21 e-mail was "made with actual authority to bind the Registry," and must therefore "be imputed to the Registry board members," thereby disqualifying the Registry as a whole from this investigation. Complainant seems to argue that if Ms. Hines accurately stated the Registry's interpretation of the applicable law, then the Registry members are precluded from applying that interpretation of the law to the facts of this case. Complainant seems to equate precedent with prejudicial

² Complainant contradicts this argument when he argues, on page 14 of his Motion, that Jan Hines "holds actual authority to bind the Registry in the very manner relied upon" by the Respondents. Indeed, Complainant thus concedes that Mr. King was entitled to rely upon Ms. Hines' e-mail pursuant to KRS 501.070(3)(d).

prejudgment, which turns the law of judicial disqualification on its head. A court is not disqualified from hearing a case because one party relies upon the precedent of a previous decision by that court.³

Similarly, administrative agencies are empowered to interpret their authorizing statutes by promulgating regulations and issuing advisory opinions, and are likewise authorized to investigate and adjudicate claims those statutes – as previously interpreted by those agencies – have been violated. Complainant essentially argues that in promulgating a regulation, an agency has prejudged the issue, and is disqualified from ever investigating or adjudicating a case involving its own regulations. Complainant’s argument ignores basic principles of administrative law.

Complainant’s remaining arguments are based upon complete misstatements of fact and merit no further discussion. Because Complainant’s underlying claims are without merit, his motion must be denied.⁴

Conclusion

In sum, Complainant’s motion to disqualify the Kentucky Registry of Election Finance from investigating this action must be denied for three equally dispositive reasons: (1) Complainant is not a party to this investigation and has no standing to bring the motion for disqualification; (2) KRS 13B.020(2)(f) expressly states that the provisions of Chapter 13 do not apply to the Registry of Election of Finance and campaign finance hearings conducted pursuant to KRS Chapter 121; and (3) Complainant’s underlying claim that Respondents must call

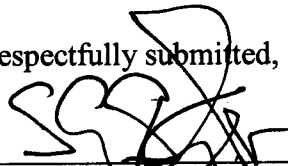
³ Judges are not disqualified by prior decisions, even erroneous ones. *Sessmer v. Commonwealth*, 273 115 S.W.2d 337, 337 (Ky. 1938). If a judge cannot be disqualified simply because of a previous position, a court cannot be disqualified from hearing a case because one party relies upon the court’s precedent.

⁴ And because Mr. Springston is not a party, counsel for Respondents also refrained from serving this Response on Mr. Springston (or Mr. Fendley). The General Counsel may elect to provide them a courtesy copy.

members of the Registry as “material witnesses,” and the Registry’s alleged lack of impartiality are totally without any basis in law or fact.

Respondents therefore respectfully request that Complainant’s Motion for Disqualification be denied promptly so that it does not delay the disposition of this investigation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27 day of July, 2009, a copy of this Response to the Motion for Disqualification was served upon the Kentucky Registry of Election Finance by mailing a copy of same to the following:

Hon. Emily Dennis
General Counsel
Kentucky Registry of Election Finance
140 Walnut Street
Frankfort, KY 40601-3240



Attorney for Respondents

Not Reported in S.W.2d
Not Reported in S.W.2d, 1996 WL 76126 (Ky.App.)
(Cite as: 1996 WL 76126 (Ky.App.))

Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule
76.28(4) before citing.

Court of Appeals of Kentucky.
Jacqueline K. **SCHROERING** and David A. Lee,
Appellants,
v.
KENTUCKY REGISTRY OF ELECTION FIN-
ANCE and Deborah Moloney, Appellees.
No. 95-CA-0545-MR.

Feb. 23, 1996.
Discretionary review denied October 16., 1996;
opinion ordered not to be published.

Ky.App.,1996.
Jacqueline K. Schroering, David A. Lee v. Ken-
tucky Registry of Election Finance, Deborah Molo-
ney
Not Reported in S.W.2d, 1996 WL 76126
(Ky.App.)

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ELECTIONS**STANDING TO CONTEST
VIOLATION OF ELECTION LAWS**

Judicial candidate did not possess standing to contest Registry of Election Finance's conciliation agreement with another candidate found to have committed a technical, non-knowing violation of election laws since the wrong that the legislature intended to address was public rather than private —

Schroering v. Kentucky Registry of Election Finance (95-CA-0543-MR); Franklin Cir. Ct., Graham, J.; Opinion by Judge Gardner, affirming, rendered 2/23/96. [This opinion is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky. CR 76.30.]

Appellants, Jacqueline Schroering and David Lee, appeal from an order of the Franklin Circuit Court dismissing their appeal from a decision of the Kentucky Registry of Election Finance. Schroering, a former district judge and a judicial candidate, and Lee, Schroering's official custodian of campaign records, had filed a complaint with the Kentucky Registry of Election Finance alleging that the campaign of Deborah Moloney, Schroering's opponent, had failed to register and file campaign reports as required by law. The

Kentucky Registry of Election Finance took the matter under consideration and ultimately entered into a conciliation agreement with Moloney. Schroering and Lee appealed to the circuit court from the registry's ruling. The circuit court concluded that they lacked standing to bring the appeal, and thus dismissed their appeal.

Schroering and Lee have appealed to this Court, again contending that they do have standing to appeal from the Kentucky Registry of Election Finance's ruling. We disagree with their arguments, and hence agree with the circuit court's order. The circuit court's order of December 9, 1994, was correct and well reasoned, and we hereby adopt it as follows:

This appeal from a decision of the Kentucky Registry of Election Finance ("KREF") is before the Court on Appellees' motion to dismiss. Appellees argue that this appeal should be dismissed because Appellants lack standing and because the KREF based its decision upon substantial evidence which is supported by law. Appellants respond that they have standing because they are directly involved in KREF's actions, and they further contend that KREF's actions were arbitrary and not supported by law.

This matter originates from a race for the office of Judge of the Jefferson District Court, 30th Judicial District, Division 8, between incumbent Jacqueline K. Schroering and challenger Deborah Moloney. The named Appellant, David A. Lee, who functioned as Schroering's official custodian of campaign records, filed a complaint with KREF on August 27, 1993, alleging that Moloney failed to register and file the required reports for her campaign committee. Moloney's counsel and campaign treasurer, David Holton II, responded to the charges on September 24, 1993. Although Moloney had formed a campaign committee, Moloney did not officially register and file her campaign committee until September 11, 1993, following her notice of Lee's complaint. Despite the fact that Moloney did not officially register earlier, neither Appellants nor KREF contend that Moloney improperly solicited funds or improperly handled campaign contributions.

A brief explanation of the events leading up to Lee's complaint is necessary to clarify the factual situation. On approximately April 17, 1993, advice was given to Moloney's campaign by KREF's general counsel, Mr. Shull, which led Moloney to believe that registration of her campaign committee with KREF was not necessary. Mr. Shull concedes that, based upon incomplete information or miscommunication, he gave Moloney's campaign the impression that the campaign finance law did not technically require a judicial candidate to register a campaign committee with KREF. Moreover, despite Moloney's notification received by KREF on April 20, 1993, that Holton would be her campaign treasurer, KREF apparently failed to take note of the change and continued to send correspondence to Moloney at the address of her former treasurer, Mr. Edward K. Black. On April 22, 1993, KREF's employee Joanna Jackson notified Moloney that she needed to complete a Political Committee Registration form if she wished to register a committee for her campaign;

unfortunately, this notification was sent to the address of Black, Moloney's former treasurer, rather than Holton. Holton swore in an affidavit of September 12, 1993, that KREF never contacted him to inform him of Moloney's failure to file the Political Committee Registration form.

During KREF's quarterly meeting on January 26, 1994, the matter came on for investigation before the full KREF board. Based upon the fact that Moloney did not register because of the incomplete advice of KREF's own counsel, KREF counsel Stanley recommended to the KREF board that the complaint be dismissed, or in the alternative, that the board find that one technical, civil violation of KRS 121.170(1) occurred as a result of the advice of KREF counsel. Following presentation of the matter by Stanley and additional comments by Lee's counsel and Moloney's counsel, the board passed a motion determining that probable cause existed to find a non-knowing violation on Moloney's part. The board also ordered Moloney and the KREF to attempt to arrive at a conciliation agreement. On March 9, 1994, Moloney and KREF entered into a conciliation agreement whereby Moloney agreed to pay a civil penalty of \$500.00 and waived any further hearing. The board allowed Lee's counsel to be heard but refused to allow him to elicit testimony or cross examine witnesses. This appeal followed.

Appellees contend that Appellants lack standing because they are not directly involved or affected by the decision of the KREF. KRS 121.140(6) provides that:

Any person directly involved or affected by an action of the registry or the panel which is final, other than of a determination to refer a violation to the Attorney General for prosecution, may seek judicial review of the action within thirty (30) days after the date of the action.

Individuals do not possess [sic] a right to be heard in the courts of Kentucky at any time and for any reason, but rather individuals must have a judicially recognizable interest in the subject matter in order to gain standing before the court. See *City of Louisville v. Stock Yards Bank & Trust Co., Ky.*, 843 S.W.2d 327 (1992). Moreover, the rule in Kentucky is that "[a] public wrong . . . cannot be redressed in a suit in the name of an individual whose interest in the right asserted does not differ from that of the public generally." *Lexington R.B.D. Ass'n v. Dept. of A.B.C. Board, Ky.*, 303 S.W.2d 268, 269-270 (1957), quoting *Wegener v. Wehrman, Ky.*, 227 S.W.2d 997 (1950).

The wrong that the legislature intended to address through the creation of KREF is a public, not a private wrong. KRS Ch. 121 does not encourage or provide a legal right for one candidate to pursue another candidate for alleged financing infractions; KRS Ch. 121 simply gives a candidate the same right as any other citizen to report an alleged violation of the laws to the KREF. The provisions of KRS 121 provide for alleged violations to be turned over to the state, which then pursues the matter without further intervention of the original complainant. For example, KRS 121.140 discusses only the rights of the alleged violator and the KREF. The

KREF is given the power of subpoena and the ability to compel production of evidence. KRS 121.140(1). The alleged violator determines whether or not to enter into a conciliation agreement and the registry is given the right to ask the court system to enforce compliance with any conciliation agreement signed by the parties. KRS 121.140(3). Although KREF must notify the complainant if a hearing is to be held, the statute does not provide for the complainant to play any role in the hearing. See KRS 121.140(4). The attorney for KREF must present the evidence against the alleged violator and KREF must provide the alleged violator full due process protections, but the statute is silent as to any right of the complainant to take part in the hearing. *Id.*

What is not contained in KRS Ch. 121 convinces us that the legislature did not intend for the complainant in a case before the KREF to play a role in the process once the KREF has accepted the complaint and started its investigation. The role of the complainant under KRS 121.140 is quite similar to the role a victim plays in a criminal proceeding: the victim of a crime brings the alleged violation of the law to the Commonwealth and the alleged violation is considered as a crime against the people as a whole. The Commonwealth then investigates and prosecutes the action and the victim of the crime has no right to pursue separate criminal charges of his or her own, or to appeal the conviction (or lack thereof) obtained by the Commonwealth. Similarly, under KRS Ch. 121 and the relevant administrative regulations, once a complainant brings forward charges of an alleged violation of the finance campaign laws, the alleged violation of the law becomes a matter between the state and the alleged violator; the complainant is not afforded any right to control the Commonwealth's handling of the case or to individually appeal its outcome.

We also find significance in the fact that the phrase 'directly involved or affected' is not defined in KRS Ch. 121. The legislature is presumed to know the status of the law at the time a statute is enacted. *Lexington R.B.D. Ass'n, quoting Com., Dept. of Banking & Securities v. Brown, Ky.*, 605 S.W.2d 497 (1980). Case law shows that the legislature has chosen in the past to define the terms describing who may appeal a decision in such a way as to encompass parties, such as competitors, that might not otherwise be assumed to have standing to appeal an administrative decision. See *Humana of Kentucky v. NKC Hospitals, Ky.*, 751 S.W.2d 369, 370-371 (1988). For example, in legislation regarding the Certificate of Need ("CON") process, the General Assembly specifically defined 'affected persons' to include competitors of those health care facilities applying for a CON. *Id.*; KRS 216B.015(2). The Court therefore determined that NKC Hospitals had standing to seek a declaration of rights, including a possible right to demand a formal statutory hearing. The Court of Appeals of Kentucky distinguished *NKC Hospitals* in *PIE Mutual Ins. v. Kentucky Medical Ins., Ky. App.*, 782 S.W.2d 51, wherein it determined that Kentucky Medical Insurance Company ("KMIC") did not have standing to contest the issuance of certification of authority to another

insurer, PIE Mutual Insurance Company ('PIE'). KMIC filed an application for hearing pursuant to a statute which provided that the Commissioner shall hold a hearing 'upon written application for a hearing by a person aggrieved by any act . . . or failure of the commissioner to act, or by any . . . order of the commissioner.' *PIE Mutual Ins.* at 52. In determining that KMIC lacked standing, the Court of Appeals noted the significance of the fact that KMIC did not point out any statute, other than the general hearing statute, to prove that KMIC was properly within the zone of interest to be protected or regulated. Thus, the issue became whether legislature intended to allow a third party to challenge the certificate of an insurer. Noting that the Insurance Code did not contain a definition of 'person aggrieved,' such as the Court in *NKC Hospital* relied upon when reviewing the meaning of 'affected person,' the Court of Appeals held that KMIC was not a 'person aggrieved' by the issuance of a certificate to PIE and therefore KMIC lacked standing.¹

¹ We recognize that the factual circumstances of *PIE Mutual Ins.* and *NKC Hospitals* differ from the case at bar, in that the cited cases involved business competitors rather than candidates in competition for a judicial seat. Nonetheless, we believe that the reasoning of the courts in those cases can be applied to the facts of this matter.

Appellants have failed to convince this Court that they are 'directly involved or affected' by KREF's actions or that they have a judicially recognizable interest in the subject matter. Like the Court of Appeals in *PIE Mutual Ins.*, we believe it is significant that the General Assembly did not specifically define the phrase at issue to include competitors and/or other third parties. *NKC Hospitals* teaches that the General Assembly has done so when it believes that it is important to give third parties a greater role in the administrative process. In this case, however, the phrase was not defined to include Appellants and we can discern no way in which either the finding of probable cause or the terms of the conciliation agreement impact upon the Appellants in any way. In fact, any penalty (civil or criminal) which could result from the actions of KREF directly involves and affects Moloney, but does not involve or affect Lee or Schroering.

THEREFORE, after careful review of the case law, the statutory provisions and the facts of the case at bar, we hold that Appellants lack standing to pursue this action. Defendant's motion to dismiss shall be, and hereby is GRANTED.

This is a final and appealable Order and there is no just cause for delay.

For the foregoing reasons, we affirm the order of the Franklin Circuit Court.

All concur.

Before: Gardner, Huddleston and Johnson,
Judges.