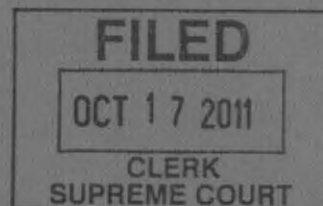


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2010-SC-0809-D
[2009-CA-0728]



COMMONWEALTH OF KENTUCKY

APPELLANT

V. APPEAL FROM FRANKLIN CIRCUIT COURT
CASE NO. 09-CI-00087

KENTUCKY RETIREMENT SYSTEMS, ET AL.

APPELLEES

APPELLANT'S BRIEF

Respectfully submitted,

JACK CONWAY
ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to be "Jack Conway", written over a horizontal line.

STUART W. COBB
ASSISTANT ATTORNEY GENERAL
OFFICE OF ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601
TELEPHONE NO.: (502) 696-5442
FAX NO.: (502) 573-1009
COUNSEL FOR APPELLANT
COMMONWEALTH OF KENTUCKY

I, STUART W. COBB, do hereby certify that a true and correct copy of this Appellant's Brief was sent via U.S. Mail, postage pre-paid, to Hon. Brent L. Caldwell, Caldwell, Caldwell & Caldwell PLLC, 156 Market Street, Lexington, Ky. 40507, Hon. Robert W. Kellerman, Stoll Keenon Ogden PLLC, P.O. Box 5130, Frankfort, Ky. 40601, Hon. Schuyler J. Olt, 1260 Louisville Rd., Frankfort, Ky. 40601, and Judge Thomas D. Wingate, P.O. Box 678, Frankfort, Ky. 40602 this 17 day of October, 2011.

A handwritten signature in dark ink, appearing to be "Stuart W. Cobb", written over a horizontal line.

STUART W. COBB

INTRODUCTION

This is a case in which multiple plaintiffs filed a declaratory judgment action against the Commonwealth of Kentucky and the Kentucky Retirement Systems. The Commonwealth sought a dismissal of the action on the grounds that it did not waive its sovereign immunity to suit in the Declaratory Judgment Act, KRS Chapter 418.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth of Kentucky requests oral argument because this is a constitutional issue concerning important questions of separation of powers and state sovereignty.

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STATEMENT OF THE CASE

On January 16, 2009, multiple plaintiffs (hereinafter collectively "John Aubrey") filed a complaint for declaratory and injunctive relief against the Commonwealth of Kentucky and the Kentucky Retirement Systems (T.R., Complaint, pp. 1-34). On February 25, 2009, the Commonwealth of Kentucky moved to dismiss the suit against it on the grounds of sovereign immunity (T.R., Motion to Dismiss, pg. 70). In his response, John Aubrey asserted that he was no longer seeking injunctive relief, but only a declaratory judgment (T.R., Response to Defendant's Motion to Dismiss, pp. 87-90). On April 8, 2009, Franklin Circuit Court Judge Thomas D. Wingate entered an order denying the motion to dismiss and holding that sovereign immunity did not protect the Commonwealth from declaratory judgment actions because no monetary recovery was being sought from the Treasury (T.R., Order Denying Motion to Dismiss, pp. 96-98). On April 20, 2009, the Commonwealth filed its Notice of Appeal in order to assert its sovereign immunity (T.R., Notice of Appeal, pg. 99). On November 19, 2010, the Court of Appeals affirmed Judge Wingate's order on the grounds that because the Kentucky Retirement Systems was an arm of the Commonwealth and its immunity had been waived by statute, the statutory waiver of the Kentucky Retirement System's immunity constituted a waiver of the Commonwealth's sovereign immunity.

ARGUMENT

The Commonwealth of Kentucky argued that the suit against it was barred by sovereign immunity in its motion to dismiss (T.R., Motion to Dismiss, pg. 70), and at oral argument in support of its motion (T.R., Video Log, 48-02-09-VCR-09, pp. 94-95).

I. THE COMMONWEALTH IS IMMUNE FROM SUIT UNLESS IMMUNITY HAS BEEN WAIVED BY THE GENERAL ASSEMBLY

Sovereign immunity is a concept that arose from the common law of England and was embraced early in our nation's history. *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001). "It is an inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity." *Id.* The Kentucky Court of Appeals recognized early on that without a directive from the General Assembly allowing suit to be brought against the Commonwealth, the Commonwealth was not suable in its own courts. *Divine v. Harvie*, 7 T.B.Mon. 435, 23 Ky. 439 (Ky. 1828).

Section 231 of the Kentucky Constitution states: "The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." In light of the ancient doctrine of sovereign immunity, the courts only find such a directive by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction. *Withers v. University of Kentucky*, 939 S.W.2d 340, 346 (Ky. 1997). Since there is no such language in KRS Chapter 418, the Declaratory Judgment Act, the Commonwealth cannot be made a defendant to a declaratory judgment action.

The Commonwealth's sovereign immunity is not limited to tort actions. The Commonwealth is also immune from suit based on a contract claim, *Ammerman v. Board of Education of Nicholas County*, 30 S.W.3d 793, 796-97 (Ky. 2000), except for suits brought in accordance with the limited waiver of sovereign immunity expressly provided for by the General Assembly in KRS 45A.245 et seq. The Court also held in *Ammerman* that suits against the Commonwealth for breaching a statutory duty were barred by sovereign immunity, unless the

statute waives sovereign immunity. Thus the plaintiffs in *Ammerman* had no remedy for an alleged violation of KRS 160.290, *Ammerman* at 796-97, but violations of the Kentucky Civil Rights Act were actionable because the Kentucky Supreme Court had determined in *Department of Corrections v. Furr*, 25 S.W.3d 615 (Ky. 2000) that the Kentucky Civil Rights Act did contain a waiver of sovereign immunity. *Ammerman* at 797.

The Court of Appeals has stated that equitable actions against the Commonwealth are barred by sovereign immunity. *Whittenberg Const. Co. v. University of Kentucky*, 2007 WL 3037721 (Ky.App. 2007) (attached as Exhibit 3); *Harmon v. Commonwealth*, 2008 WL 4367833 (Ky.App. 2008) (attached as Exhibit 4). Thus there was no action which could be brought against the sovereign under the common law, whether it sounded in tort, contract or equity. As this Court has held for over 180 years, *see Divine, supra*, unless the General Assembly provides a directive as to what court and in what manner suit can be brought against the Commonwealth pursuant to § 231 of the Constitution, no action may be brought against the Commonwealth in its own courts.

The rationale for this concept is grounded in the Separation of Powers Doctrine that the courts “should not be called upon to pass judgment on policy decisions made by members of coordinate branches of government, because such actions provide an inadequate crucible for testing the merits of social, political, or economic policy.” *Yanero, supra* at 519. Thus the purpose of sovereign immunity is not merely to protect the Treasury, but also to maintain an appropriate balance of power between the legislative, executive and judicial branches of government.

II. THE DECLARATORY JUDGMENT ACT DOES NOT WAIVE SOVEREIGN IMMUNITY

Actions for declaratory judgments did not exist at common law in the United States, and came into vogue only in the Twentieth Century. 16 Am. Jur., *Declaratory Judgments*, pg. 274. Kentucky first enacted a Declaratory Judgment Act in 1922, Kentucky Acts, C 83 §1, which was codified in the Civil Code, 639a-1. Since declaratory judgment actions could not be brought at common law, no common law exception to sovereign immunity allowing them to be brought against the Commonwealth ever existed. In order to find a waiver of sovereign immunity to a declaratory judgment action, one must look in the statutes enacted into law by the General Assembly. Pursuant to § 231 of the Constitution, only the General Assembly has the authority to determine in what manner and in what courts suits may be brought against the Commonwealth. According to a legal treatise, “[a] state may maintain an action for a declaratory judgment, but such an action may not be maintained against the state unless it has given its consent to be sued.” 26 C.J.S. *Declaratory Judgments* § 133 (2010).

Pursuant to *Withers, supra*, the Court will only find a waiver of sovereign immunity in a legislative enactment if it is expressed by the most explicit language or by an overwhelming implication from the text which leaves no room for an alternative reasonable construction. Since there is no such express language or overwhelming implication in the Declaratory Judgment Act, such actions brought against the Commonwealth are barred by sovereign immunity. In fact, the overwhelming implication of the language is that no one can make the Commonwealth a party to a declaratory judgment action against its will.

KRS 418.075 sets forth who are necessary parties to an action for declaratory relief:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings.

The mandate seems broad, however the key word, "person" is defined in KRS 418.085 as follows: "The word 'person' wherever used in KRS 418.040 to 418.090 shall be construed to mean any person, joint stock company, incorporated association, or society, or municipal or other corporation of any character whatsoever."

Conspicuous by their absence from this list of specified "persons" is any reference to the Commonwealth, as you would expect to see if the General Assembly had intended to waive the Commonwealth's sovereign immunity. Not only is there no express language including the Commonwealth as a person to be made a party, the rules of statutory construction strongly imply the Commonwealth is not to be included in the definition of "person". "As a general rule of statutory construction, *expressio unius est exclusio alterius* provides that an enumeration of a particular thing demonstrates that the omission of another thing is an intentional exclusion." *Palmer v. Commonwealth*, 3 S.W.3d 763, 764 (Ky.App. 1999). Because the General Assembly identified numerous specific entities to be included in the definition of "persons" to be parties to a declaratory judgment action, the court must presume that the General Assembly intended to exclude the Commonwealth, especially in light of the rigorous requirement in *Withers* that waiver of sovereign immunity be express or overwhelmingly implied by the text.

In addition to the fact that the rules of statutory construction require the court to presume that the omission of the Commonwealth from the definition of "person" was intentional, there is additional statutory language demonstrating the purely voluntary nature of the Commonwealth's participation in declaratory judgment actions. KRS 418.075(1) provides:

In any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard, and if the ordinance or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the petition and be entitled to be heard.

Rather than mandating that the Attorney General be made a party like a "person" who has an interest, KRS 418.075(1) only requires that the Attorney General be served and given the opportunity to be heard, if he so chooses. If in fact the General Assembly had intended to waive sovereign immunity and include the Commonwealth as a "person" who shall be made a party, this subsection would be unnecessary because first, the Attorney General would have been served as the agent of the Commonwealth pursuant to CR 4.04(6), and second, in most instances the Attorney General would be representing the Commonwealth as a party to the action. "Statutes should not be construed such that their provisions are without meaning, whether in part or in whole." *George v. Scent*, 346 S.W.2d 784 (Ky. 1961). Thus the clear implication of KRS 418.075(1) is that the Commonwealth cannot be made a party to a declaratory judgment action against its will.

John Aubrey's argument that the fact that the Attorney General must be served and is entitled to be heard when the validity of a statute is questioned pursuant to KRS 418.075 overwhelmingly implies a waiver of sovereign immunity is utterly unsupported by case law. In fact, the Court of Appeals has held that KRS 418.075 does not even imply that a court has to give the Attorney General time to respond after he is served before it enters a judgment. *Hinkle v. Commonwealth*, 104 S.W.3d 778, 780 (Ky. App. 2002). If such service made the Commonwealth a party to the action, the Attorney General would be entitled to twenty (20) days to file an answer pursuant to CR 4.02.

This issue has been dealt with in other states which also recognize the traditional doctrine of sovereign immunity. The Supreme Court of Tennessee held that its declaratory judgment act, which is very similar to Kentucky's, does not waive sovereign immunity. Instead it allows declaratory judgment actions to be brought against state officials in their individual capacities, since in that capacity they are "persons" against whom a declaratory judgment action can be brought. *Colonial Pipeline Company v. Morgan*, 263 S.W.3d 827, 853 (Tn. 2008) (attached as Exhibit 5).

As in Tennessee, sovereign immunity does not mean that plaintiffs who wish to challenge the constitutionality of a statute lack a remedy. The other defendant in the suit below is the Kentucky Retirement Systems. KRS 61.645(2)(a) expressly authorizes the Board of Trustees of the Kentucky Retirement Systems to sue and be sued in its corporate name, thus they qualify as a "person" as that term is defined in KRS 418.085. There is no remedy the plaintiffs can obtain against the Commonwealth that is not available to them pursuant to the Declaratory Judgment Act against the Board of Trustees of the Kentucky Retirement Systems.

Allowing plaintiffs to sue the Commonwealth rather than state officials would also complicate the defense of declaratory judgment actions since the Commonwealth is a large entity with numerous officials each with their own areas of responsibility. If a plaintiff names an individual state official as defendant who has the responsibility to enforce the statute in question, that official has the expertise to promptly respond with an appropriate defense. If instead a plaintiff can simply name the Commonwealth, response will be slowed as the Attorney General will then have the burden of determining who is the most appropriate official to respond to the suit. Some officials may also be less inclined to vigorously defend a statute if only the

Commonwealth, and not the official in question, is named as a defendant. In addition, when a specific state official whose activities are allegedly injuring the plaintiff is named as a defendant, the court can more readily identify the existence of a justiciable controversy and the issues in need of adjudication. The Commonwealth can only take action by way of individual officers and employees. When a complaint names only the Commonwealth rather than the state official whose activities are actually causing the controversy, it introduces an unnecessary level of abstraction which is not conducive to resolution of the controversy.

In *Jewish Hosp. Healthcare Sevices, Inc. v. Louisville/Jefferson County Metro Government*, 270 S.W.3d 904, 908 (Ky.App. 2008) the Court of Appeals erred when it stated that this Court had held that sovereign immunity did not apply to declaratory judgment actions in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989). In *Rose* a declaratory judgment action was brought against the President of the Senate and the Speaker of the House, however neither of them filed a motion to dismiss on grounds of legislative immunity, *Baker v. Fletcher*, 204 S.W.3d 589, 595 fn. 23 (Ky. 2006), thus this Court did not hold in *Rose* that legislative immunity does not bar declaratory judgment actions. Instead, this Court held in *Baker v. Fletcher* that legislative immunity does bar declaratory judgment actions.

In *Baker v. Fletcher*, state employees sought declaratory and injunctive relief against Governor Fletcher for issuing an executive order suspending KRS 18A.355, which grants state employees a 5% annual increment, as part of his emergency spending plan due to the failure of the General Assembly to pass a biennial budget. *Id.*, 204 S.W.3d at 591. In the next regular session, the General Assembly enacted a budget which retroactively suspended that same statute. *Id.*

This Court held that because Governor Fletcher's emergency spending plan was void *ab initio*, the logical party against whom the action should have been taken was the General Assembly, because it was the party which retroactively suspended KRS 18A.355. *Id.* at 593. However Section 43 of the Kentucky Constitution grants members of the General Assembly absolute immunity from suit, therefore state employees could not seek declaratory or injunctive relief against them. *Id.* at 595. Thus in the *Baker* decision in 2006, this Court reversed its holding in 1995 that the General Assembly was not immune from declaratory judgment actions in *Jones v. Bd. of Trustees of Kentucky Retirement Systems*, 910 S.W.2d 710 (Ky. 1995). Therefore the Court of Appeals erred in 2008 in *Jewish Hosp. Healthcare Sevices, Inc.* by relying on *Rose* and *Jones* to find that sovereign immunity does not bar a declaratory judgment action, since this Court's most recent opinion in *Baker* held that absolute immunity does bar declaratory judgment actions.

However, this did not leave John Aubrey without a possible remedy. Just as Tennessee state officials can be sued in their individual capacities for declaratory relief, *Colonial Pipeline Company, supra*, the Board of Trustees of the Kentucky Retirement Systems, which John Aubrey named as a party defendant, can be sued for declaratory relief in this action.

III. KRS 61.692 DOES NOT WAIVE SOVEREIGN IMMUNITY FOR DECLARATORY JUDGMENT ACTIONS.

John Aubrey argued in his Court of Appeals Brief that KRS 61.692 combined with KRS 418.075 meets the test for waiver of sovereign immunity-that the courts only find such a directive by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction. *Withers, supra*, 939 S.W.2d at 346. In fact, since

John Aubrey can obtain complete relief without the Commonwealth of Kentucky as a defendant, there is no need to imply a waiver of sovereign immunity, therefore the courts cannot do so.

Just because KRS 61.692 establishes that state employees have an “inviolable contract” with the Commonwealth, does not necessarily mean that state employees can bring legal actions against the Commonwealth in and of itself, rather than any state official or entity. The Commonwealth is immune from suit for its contracts, *Ammerman v. Board of Education of Nicholas County*, 30 S.W.3d 793, 796-97 (Ky., 2000) except as authorized by the General Assembly in KRS 45A.245 et seq. Thus the mere existence of a contract between state employees and the Commonwealth does not automatically grant state employees a right to seek declaratory relief from the Commonwealth—there must be a waiver of the Commonwealth’s sovereign immunity for declaratory judgment actions. Since there is no such waiver in the Declaratory Judgment Act, John Aubrey’s claim for declaratory relief against the Commonwealth is barred by sovereign immunity. The fact that John Aubrey can proceed against the Board of Trustees of the Kentucky Retirement Systems shows that there is a reasonable construction of the statutes other than waiver of sovereign immunity, therefore pursuant to *Withers* this Court cannot find an implicit waiver of sovereign immunity.

IV. KRS 418.075(4) DOES NOT WAIVE SOVEREIGN IMMUNITY FOR DECLARATORY JUDGMENT ACTIONS.

John Aubrey also argued in his Court of Appeals Brief that KRS 418.075(4) creates by overwhelming implication a waiver of the Commonwealth’s immunity from declaratory actions. In KRS 418.075(4), enacted in 2003 (2003 Ky. Acts ch. 152, sec. 1), the General Assembly reiterated its own immunity under § 43 of the Kentucky Constitution and attempted to extend

immunity from declaratory actions to the General Assembly's organizations, officers and employees pursuant to § 43 and § 231 of the Kentucky Constitution. If he cannot bring an action against any legislative employee, John Aubrey argues he must, by necessary implication, be able to bring a suit against the Commonwealth itself.

No such implication exists because, as discussed above, John Aubrey can and already has brought this declaratory judgment action against the Board of Trustees of the Kentucky Retirement Systems, the proper defendants in this action. Since John Aubrey has a remedy, there is no need for the Commonwealth itself to be the defendant. Since there is no need, it cannot be implied pursuant to *Withers*.¹ This is because a reasonable construction of the statutes is that the General Assembly intended that declaratory judgment actions be brought against not members of the General Assembly or the Commonwealth, but rather against individual state officials or corporate bodies such as the Board of Trustees of the Kentucky Retirement Systems.

V. KRS 61.645(2)(a) DOES NOT WAIVE SOVEREIGN IMMUNITY FOR DECLARATORY JUDGMENT ACTIONS.

The Court of Appeals erred in holding that KRS 61.645(2)(a), which grants the Board of Trustees of the Kentucky Retirement Systems the power to sue and be sued in its corporate name, is a waiver of sovereign immunity which allows the Commonwealth of Kentucky to be named a party defendant in a declaratory judgment action. The Court of Appeals failed to recognize the

¹ Furthermore, pursuant to this Court's holding in *Yanero, supra*, that the General Assembly could not extend sovereign immunity pursuant to KRS 44.073(2) to state employees for the performance of ministerial duties, *Yanero*, 65 S.W.3d at 524, it is possible that the General Assembly's attempt pursuant to KRS 418.075(4) to extend legislative immunity to its employees is also a nullity. However, since there is a proper defendant before the Court in this case, the Board of Trustees of the Kentucky Retirement Systems, the Court does not have to decide that issue.

distinction discussed in *Yanero*, between agencies of the Commonwealth, which are protected by governmental immunity, and the Commonwealth itself, protected from suit by sovereign immunity.

In *Yanero*, this Court recognized that while the Commonwealth itself is cloaked with the protection from suit by sovereign immunity, which is absolute unless waived by the General Assembly, agencies of the Commonwealth instead have governmental immunity. This is because agencies, such as the Board of Trustees of the Kentucky Retirement Systems, only have immunity to the extent they engage in governmental functions, as opposed to proprietary functions. *Yanero*, 65 S.W.3d at 519. In *Yanero*, this Court quoted *Gross v. Kentucky Board of Managers*, 105 Ky. 840, 49 S.W. 458 (Ky. 1899), which stated:

It is true that this board has been called, in an opinion by this court, an “agency of the state.” It was an agency of the state, but it was also vested with corporate powers, and in its corporate capacity it may be sued for its corporate acts, just as any other corporation.

Id., 49 S.W. at 459.

Gross was relied upon by this Court in *Kentucky Center for the Arts v. Berns*, 801 S.W.2d 327 (Ky. 1990), in which the Court analyzed several factors to make a distinction between governmental and proprietary functions to determine whether or not an agency is entitled to governmental immunity. Thus KRS 61.645(2)(a), which provides that the Board of Trustees of the Kentucky Retirement Systems can sue or be sued in its corporate name, properly seen does not waive the Commonwealth’s sovereign immunity, as the Court of Appeals erroneously concluded, but merely waives the governmental immunity of the Board of Trustees of the Kentucky Retirement Systems. This allows a person to seek a judicial remedy against the Board

of Trustees of the Kentucky Retirement Systems for a claim of a violation of the person's retirement rights without having to go through a *Berns* analysis of governmental function versus proprietary function. The conclusion by the Court of Appeals that KRS 61.645(2)(a), which specifically allows the Board of Trustees of the Kentucky Retirement Systems to sue or be sued, waives the sovereign immunity of the entire Commonwealth and permits suits concerning the Kentucky Retirement Systems against the Attorney General, who has no responsibility or authority to implement the provisions of KRS Chapter 61 concerning Kentucky Retirement Systems, does not follow from either the statute or the precedents of this Court.

CONCLUSION

Wherefore the Commonwealth of Kentucky requests that the opinion and order of the Franklin Circuit Court be REVERSED, and the case remanded with directions to dismiss the complaint against the Commonwealth of Kentucky as being barred by sovereign immunity.

Respectfully submitted,

JACK CONWAY
ATTORNEY GENERAL



STUART W. COBB
ASSISTANT ATTORNEY GENERAL
OFFICE OF ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601
TELEPHONE NO.: (502) 696-5442
FAX NO.: (502) 573-1009
COUNSEL FOR APPELLANT,
COMMONWEALTH OF KENTUCKY