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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 REPLY BRIEF

Respectfully submitted,

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I, STUART W. COBB, do hereby certify that a true and correct copy of this Appellant's Reply 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 29 day of December, 2011.



STUART W. COBB

ARGUMENT

In two separate briefs, the appellees failed to cite, much less address, the most recent holding of this Court on the issue of whether declaratory judgment actions are barred by an absolute immunity defense, *Baker v. Fletcher*, 204 S.W.3d 589 (Ky. 2006). This Court held that absolute legislative immunity bars declaratory judgment actions against members of the General Assembly, and noted the fact that their decision was not in conflict with its opinion in *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989) because neither the President of the Senate nor the Speaker of the House moved to dismiss that case on the grounds of legislative immunity. *Baker v. Fletcher* at 595, fn 23. The appellees instead chose to rely on a Court of Appeals opinion, *Jewish Hosp. Healthcare Services, Inc. v. Louisville/Jefferson County Metro Gov't*, 270 S.W.3d 904 (Ky.App. 2008), which is not binding on this Court and is not in accord with this Court's opinion in *Baker v. Fletcher*.

The appellees have asked this Court to dismiss sovereign immunity as a "feudal concept", and treat the requirement that suits be brought against state officials, rather than the Commonwealth itself, as a mere fiction which the Court should dispense with. However, as this Court stated in *Baker v. Fletcher*, the fact that an immunity from suit is constitutionally required is reason enough to observe the principle. *Id.* at 596-597. In addition, the sovereign immunity doctrine embodied in the Kentucky Constitution addresses separation of power issues among the legislative, executive and judicial branches of Kentucky state government, as was recognized for Tennessee by its Supreme Court in *Colonial Pipeline Company v. Morgan*, 263 S.W.3d 827, 849 fn 13 (Tn. 2008). There is nothing wrong with holding state officials, such as the Board of Trustees of the Kentucky Retirement Systems, accountable in court if their actions violate the Constitution. *Baker v. Fletcher* at 597. As the Commonwealth stated in its Appellant's Brief,

state officials who are actually engaged in allegedly unconstitutional actions are proper and appropriate parties to declaratory judgment actions, rather than “the Commonwealth” which encompasses thousands of employees and hundreds of agencies, departments, boards and offices completely unconnected to the issues at hand.

This Court’s opinion in *Foley v. Commonwealth*, 306 S.W.3d 28 (Ky. 2010) also does not support the appellees’ position. The only issue before the Court in *Foley* was whether or not to affirm the circuit court’s dismissal of the plaintiff’s declaratory judgment action due to the lack of an actual controversy. *Id.* at 31. Since the case never got beyond the threshold issue of whether an actual controversy even existed which a court could address, there is no implication that the Commonwealth’s sovereign immunity could not have been raised as a defense to the action.

In the Appellant’s Brief, the Commonwealth showed that there is a reasonable construction of each of the statutes the Appellees are relying on which does not require a waiver of sovereign immunity. Thus, pursuant to *Withers v. University of Kentucky*, 939 S.W.2d 340, 346 (Ky. 1997), the Court cannot find that the Commonwealth’s sovereign immunity from suit has been waived. Eroding the Commonwealth’s sovereign immunity serves no discernible purpose, since the Plaintiff Appellees cannot obtain any additional remedy from the Commonwealth which is not available to them against the Board of Trustees of the Kentucky Retirement Systems. The Appellees’ claim that sovereign immunity only protects the State Treasury is false, since at Common Law no action sounded against the sovereign in either tort, contract or equity. Declaratory judgment actions are a statutory remedy created by the General Assembly in the 20th Century, and pursuant to Section 231 of the Kentucky Constitution only the General Assembly has the power by statute to authorize suits against the Commonwealth. Since

the General Assembly has not authorized declaratory judgment actions against the Commonwealth, such actions are inherently barred by sovereign immunity.

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.

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