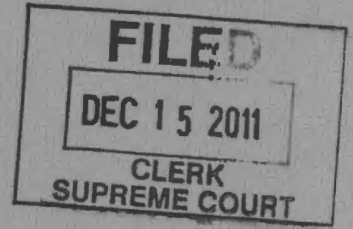


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2010-SC-0809-D
[2009-CA-0728]



COMMONWEALTH OF KENTUCKY

APPELLANT

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

KENTUCKY RETIREMENT SYSTEMS, ET AL.

APPELLEES

BRIEF FOR APPELLES, JOHN AUBREY, ET AL.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, BRENT CALDWELL, I hereby certify that the original and eleven (11) copies of the Respondent's brief were filed with Susan Clary, Clerk of the Supreme Court of Kentucky, Room 235 Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky, 40601, by first-class U.S. Mail to the Supreme Court of Kentucky on December 9th, 2011. I also certify that a true and correct copy of this Appellees' Brief was sent via U.S. Mail, postage pre-paid to Stuart W. Cobb, Assistant Attorney General, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, Ky. 40601, Robert W. Kellerman, Stoll Keenon Ogden PLLC, P.O. Box 5130, Frankfort, Ky. 40602, Schuyler J. Olt, 1260 Louisville Rd., Frankfort, Ky. 40601, and Judge Thomas D. Wingate, P.O. Box 678, Frankfort, Ky. 40602 this 15th day of December, 2011.

BRENT L. CALDWELL

INTRODUCTION

In this case the Plaintiffs (here the Aubrey Appellees) filed a declaratory judgment action against the Commonwealth of Kentucky and the Kentucky Retirement Systems challenging a retirement statute, KRS 61.637(17), on various grounds, including violation of different sections of the Kentucky Constitution. The only question before this Court is whether the Commonwealth of Kentucky is to remain a named party to the action.

STATEMENT CONCERNING ORAL ARGUMENT

The Aubrey Appellees request oral argument because a decision on the issue presented may impact the separation of powers among the legislative, executive and judicial branches of the Commonwealth of Kentucky.

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COUNTERSTATEMENT OF THE CASE

The Appellees filed an action on January 16, 2009, in the Franklin Circuit Court seeking declaratory judgment and injunctive relief. The Court denied the request for injunctive relief in an Order dated February 12, 2009, and the Appellees have not appealed that decision. On April 8, 2009, Franklin Circuit Court Judge Thomas D. Wingate entered an order denying the Commonwealth's motion to dismiss and holding that because declaratory judgment actions cannot impose tort liability upon the state or its agencies, such actions are not barred by the doctrine of sovereign immunity. (Appendix, Tab 2) The Commonwealth appealed this decision and on November 19, 2010, the Court of Appeals affirmed the decision of the Franklin Circuit Court. The Court of Appeals found that the Kentucky Retirement Systems was an agency of the Commonwealth and, since KRS 61.645(2)(a) expressly allows the Retirements Systems to be sued (in its corporate name), the Commonwealth had waived the defense of sovereign immunity and would remain a party to this action. (Appendix, Tab 1).

ARGUMENT

The Commonwealth of Kentucky does not enjoy sovereign immunity in this case for 2 reasons:

I. The General Assembly has explicitly waived the defense of sovereign immunity in all actions involving the Kentucky Retirement Systems; and

II. The express language and the overwhelming implications of KRS 418.075(4) and KRS 61.692 leaves little room for doubt that sovereign immunity for the Commonwealth has been waived in declaratory judgment actions and particularly those actions involving government retirement programs.

I. SOVEREIGN IMMUNITY IS WAIVED FOR ALL ACTIONS INVOLVING THE KENTUCKY RETIREMENT SYSTEMS.

A. KRS 61.645(2) Expressly Waives Sovereign Immunity

Section 231 of the Kentucky Constitution provides that "The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." KRS 61.515(1) established:

A retirement system for employees to be known as the "Kentucky Employees Retirement System" by and in which name it shall, pursuant to the provisions of KRS 61.510 to 61.705, transact all its business and shall have the powers and privileges of a corporation. . . .

KRS 61.645(2) provides that:

The board (of trustees of the retirement system) is hereby granted the powers and privileges of a corporation, including but not limited to the following powers:

(a) To sue and be sued in its corporate name. . . .

In *Withers v. University of Kentucky*, 939 S.W.2d 340, 346 (Ky. 1997), this Court, citing *Edelman v. Jordan*, 415 U.S. 651, 673 (1974), stated that "We will find

waiver (of sovereign immunity) only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." (Internal citations omitted). The "express language" is that the Kentucky Retirement Systems is subject to any type of litigation, not just declaratory judgment actions. Since the Kentucky Retirement Systems is an agency of Kentucky State Government, the Commonwealth has waived sovereign immunity for all matters involving the Retirement Systems. *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997), illustrates this argument perfectly. In *Withers* suit for damages was brought against the University alleging negligence at the University Hospital. The Kentucky Supreme Court, after determining the University was a state agency, found the University of Kentucky entitled to sovereign immunity. *Id.* at 343. The Court did so even though the UK hospital functioned much the same as any private/corporate hospital. It follows that if the agency is immune from suit because it is a part of the Commonwealth, then the Commonwealth waives sovereign immunity to the extent it does so for the agency.

B. "Corporate Name" Does Not Limit the Waiver

Any argument that the language of KRS 61.645(2)(a) "in its corporate name" somehow limits the sovereign immunity waiver fails for the same reason the "proprietary function" argument failed in *Withers*. Just as this Court found that the "operation of a hospital is essential to the teaching and research function (public) of the medical school, *Withers* at 343, the operation of a retirement system is essential to the personnel function of Kentucky State Government.

In *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), the Kentucky Supreme Court analyzed the corporate (proprietary) versus governmental functions of the Jefferson County Public Schools. This Court stated, citing 83 L.Ed. 794 at 803,

(C)orporations performing what are essentially public or governmental functions are in effect part of the government (and) actions against such corporations are in effect against the government, and . . . in the absence of the sovereign's consent to suit, they cannot be sued.

If a corporation is protected by sovereign immunity when performing public functions, than when the Legislature waives the immunity for a public agency, it is not limited simply because the agency has been given "corporate" privileges.

In the present case, the Kentucky Retirement Systems was given the privilege of corporate powers, whatever that means, to carry out its public function. At the same time the General Assembly waived sovereign immunity for the agency and the Commonwealth when the agency is involved in litigation.

C. Form Should Not Overcome Substance

In *Ammerman*, the Supreme Court reviewed a tort action thinly disguised as a contract claim against: "THE BOARD OF EDUCATION OF NICHOLAS COUNTY, and its members in their official capacity only, to wit: Louise Zachary, John Cleaver, Jr., James Dale, David Smoot, and Samuel Vice." *Ammerman v. The Board of Education of Nicholas County*, 30 S.W.3d 793 (Ky. 2000).

Even though the Commonwealth of Kentucky was not a named party and even though the board members were individually named, this Court did not allow form to trump substance. The *Ammerman* Court found that "There has never been any question about the status of a local school board as an agency of state government" and, citing

Rose v. The Council for Better Education, Inc. (citations omitted), recognized that "local school boards exist simply as agencies of state government . . ." and "fall within the express language of our Kentucky Constitution, (section) 231, which provides immunity to suits 'brought against the Commonwealth.'" *Id.* at 797.

In the present case, the Kentucky General Assembly expressly waived sovereign immunity without restriction for the Commonwealth of Kentucky when it acts, or fails to act, through the Kentucky Retirement Systems. The Commonwealth and the Retirement Systems can be sued in tort, contract, or any other manner devised by ingenious lawyers. This is a declaration of rights action challenging a specific statute enacted by the General Assembly and administered by the Kentucky Retirement Systems. The Commonwealth of Kentucky is a proper party because it has expressly waived its defense of sovereign immunity.

II. THE COMMONWEALTH'S SOVEREIGN IMMUNITY IS WAIVED BY KRS 61.692 AND KRS 418.075.

A. The Overwhelming Implication of KRS 61.692 is a Waiver of Sovereign Immunity

KRS 418.045, the Declaratory Judgment Act (DJA), does not create an independent statutory claim or cause of action similar to a tort or contract action that also provides a remedy if the statute is violated. KRS 418.045 provides that "Any person . . . whose rights are affected by statute . . . may apply for and secure a declaration of his rights or duties, even though no consequential or other relief be asked." KRS 418.045 clearly indicates the Plaintiff must have some sort of independent right, duty or other legal relation created by a legal document or government enactment (statute in the present case) in order to utilize the Declaratory Judgment Act. The DJA

is not a remedial statutory scheme but a procedural one that establishes the manner in which courts can adjudicate the rights of litigants. The question is not whether sovereign immunity is expressly waived in KRS 418.045 but whether any of the constitutional sections or statutes relied upon in the Appellees' Complaint meets the *Withers* criteria for waiver of sovereign immunity.

Withers requires a waiver by the "most express language or by such overwhelming implications 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), citing *Edelman v. Jordan* (internal citations omitted). In the present case Appellees are essentially challenging the Kentucky Employees Retirement Systems statute under Chapter 61 of the KRS. KRS 61.692 specifically declares that "in consideration of the contributions by the members and in further consideration of benefits received by the *state* from the member's employment, KRS 61.501 to 61.705 shall . . . constitute an inviolable contract of the *Commonwealth* . . ." (Emphasis Added). The General Assembly did not use the term "General Assembly" or "Governor" or even the Kentucky Retirement Systems but deliberately chose the Commonwealth as the proper party. The overwhelming implication is that when there is a challenge to Retirement Systems' statutory amendments the Commonwealth is the proper party to be named.

The Appellant acknowledges that the Appellees can bring this action against the Board of Trustees of the Kentucky Retirement Systems. Therefore, since there is an available remedy, there is no need for the Commonwealth to be a party. (Appellant's Brief p. 11). The problem is that the "contract" was designated between the members

and the Commonwealth; and the members, in the present case, believe that certain amendments to the Retirement Systems statutes have violated the "contract." In a suit for declaration of rights between contracting parties, it seems only appropriate that the parties to the contract be named.

The Appellees' suit is about the manner in which the General Assembly fashioned the means to provide some funds to the Retirement Systems and, in doing so, violated the Kentucky Constitution and KRS 61.692. It is not about the day-to-day management of the Kentucky Retirement Systems. Thus, while the Retirement Systems is a necessary party due to its management responsibilities and would have to expel any funds improperly collected, it is the Commonwealth that has the inviolable contract duty under KRS 61.692 and its legislative arm, the General Assembly, who violated the Kentucky Constitution by enacting legislation in conflict with the Constitution and KRS 61.692.

B. The Overwhelming Implication of KRS 418.075 is a Waiver of Sovereign Immunity

The clear intent of KRS 418.075 is that the sovereign Immunity of the Commonwealth is waived in declaratory judgment actions where the validity of a statute is in question. KRS 418.075 states:

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 proceeding.

In the present case the Commonwealth of Kentucky may certainly be affected by the declaration since the present action requires the Court to interpret and determine the constitutionality of legislative enactments. It may very well be that the Kentucky

Retirement Systems is fully capable of representing the Commonwealth's interest in this matter. As a matter of fact, the Attorney General has already filed in the record his declaration declining to defend the constitutionality of the statutes in question. Yet, the Attorney General has the resources to continue to litigate this particular issue.

The Attorney General is the chief law officer of the state, whose inherent duty is to represent his state and "advise and speak for (the states') several departments and officers in legal matters. *Johnson v. Commonwealth*, 165 S.W.2d 820, 826 (Ky. 1942). KRS 418.075 contemplates challenges to state statutes and provides that the Attorney General be given notice, served with pleadings, and is entitled to be heard in any proceeding involving the validity of a statute or any forum involving the constitutional validity of a statute. KRS 418.075(1) and (2).

The only logical conclusion is that the General Assembly, recognizing that the Declaratory Judgment Act, KRS 418.045, by its express language, waived sovereign immunity when the Commonwealth was involved, provided that the State's chief law officer would be notified and allowed to determine who could best represent the Commonwealth's interest. In addition, the General Assembly, pursuant to KRS 418.075(4), removed its members, organizations and officers as parties to any action challenging the validity of any statute. Obviously, the General Assembly could just as easily declared the Commonwealth immune to such actions but did not. Additionally, "The determination of whether an entity is entitled to protection by the constitutional principle of sovereign immunity is for the judiciary." *Withers* at 342.

III. THE COMMONWEALTH OF KENTUCKY IS NEVER IMMUNE FROM DECLARATORY JUDGMENT ACTIONS CHALLENGING THE VALIDITY OF ITS STATUTES.

The Franklin Circuit Court engaged in a brief, common-sense analysis, and determined sovereign immunity is simply not applicable to the Commonwealth in actions for declaratory judgments because the Commonwealth will not face tort liability or the loss of public funds or property. (Tab 2). In any declaratory action challenging the validity of a State statute, policy, or regulation on constitutional or other grounds, the State has an interest that should be protected. The courts can engage in legal fiction such as state officers are not immune as did the Tennessee Court in *Colonial Pipeline Company v. Morgan*, 263 S.W.3d 827 (Tn. 2008), but the fact is that some court is going to interpret a statute in light of a constitution and the resulting judgment will affect the state government whether the particular statute is found to be valid or not. KRS 418.045 contemplates actions challenging state statutes and that someone will defend those actions. KRS 418.075 insures that the chief law officer of the Commonwealth is knowledgeable of those actions and may defend the interests of the State. No sovereign immunity waiver is necessary because sovereign immunity does not exist when a person is simply challenging the validity of a statute. Whether the Commonwealth is represented by an agency, a named official, or the Attorney General, the Commonwealth's interests will be litigated and the fiction that somehow an officer or an agency head is not the Commonwealth is just fiction and not supported by Kentucky case law. *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001); *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997); *Ammerman v. Board of Education of Nicholas County*, 30 S.W.3d 793 (Ky. 2000).

CONCLUSION

The Commonwealth of Kentucky may waive sovereign immunity by the express language of statute or by such overwhelming implication from the text as will leave no room for any other reasonable construction. *Withers* at 346. KRS 61.645(2) specifically provided that the Kentucky Retirement Systems can "sue and be sued in its corporate name. . . ." Since sovereign immunity has been waived for this agency of the Commonwealth, sovereign immunity has been waived for the Commonwealth for the purposes of this statute.

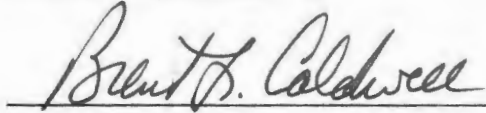
KRS 61.692 expressly created an inviolable contract between the Commonwealth and the Retirement Systems members. Any declaratory challenge to a statute interfering with this contract must include the Commonwealth as a party.

The overwhelming implication of KRS 418.075 combined with the Declaratory Judgment Act is that the Commonwealth has waived sovereign immunity when the validity of a statute is challenged or an action involves the constitutional validity of a statute as it is in the underlying action of the present case.

Finally, whatever rationale there is for preserving the feudal concept of sovereign immunity does not exist in declaratory judgment actions. The fact is the "king can do wrong" and when alleged unconstitutional legislation is enacted it is the duty of the courts to rule with all necessary parties in the action.

For the reasons stated, this Court should AFFIRM the decisions of the Franklin Circuit Court and the Court of Appeals.

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