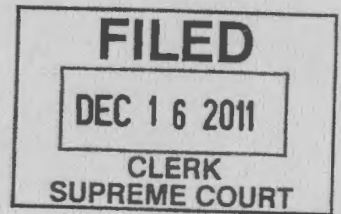


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2010-SC-0809-D
(C. A. NO. 2009-CA-000728-MR)



COMMONWEALTH OF KENTUCKY

APPELLANT

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

JOHN AUBREY, ET AL

and

KENTUCKY RETIREMENT SYSTEMS

APPELLEES


BRIEF OF APPELLEE KENTUCKY RETIREMENT SYSTEMS

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this Brief of Appellee Kentucky Retirement Systems was hand delivered to the Clerk, Kentucky Supreme Court, Capitol Building, 700 Capitol Avenue, Room 209, Frankfort, Kentucky 40601, with a true and correct copy 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 40601-3449, Brent L. Caldwell, Esq., Caldwell & Caldwell, 156 Market Street, Lexington, KY 40507, Sam Givens, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601 and Judge Thomas D. Wingate, P.O. Box 678, Frankfort, KY 40602 this 16th day of December, 2011. The undersigned does also certify that the record on appeal was not withdrawn from the Franklin Circuit Clerk on or before this date.



Attorney for Appellee

INTRODUCTION

This appeal concerns whether an action may be maintained against the Commonwealth of Kentucky in a Petition for Declaratory Judgment regarding the constitutionality of a statute, or whether it is barred by sovereign immunity. The Franklin Circuit Court and the Court of Appeals concluded that such an action could be maintained.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee Kentucky Retirement Systems takes no position on whether oral argument should be conducted, but stands ready to participate in oral argument if deemed desirable by the Court.

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COUNTERSTATEMENT OF THE CASE

The facts of this case with respect to the issue on appeal are straightforward. This Appellee generally accepts the Appellant's Statement of the Case, except to add for background purposes that the Circuit Court entered an Order on February 12, 2009 that denied the Aubrey Appellees' request for injunctive relief. That Order was not appealed. In addition, this Appellee will include some additional background in its Counterstatement of the Case for purposes of adding context.

KRS 61.637 (17) was enacted as part of HB1 during the 2008 Extraordinary Session of the Kentucky General Assembly. HB1 was a comprehensive revision of the public employee retirement plan. The Plaintiffs in this action, also referred to herein as the Aubrey Appellees, are members of the County Employees Retirement System ("CERS"), which is administered by the Board of Trustees of Kentucky Retirement Systems (the "Board"), pursuant to KRS 78.780.

The interests of Kentucky Retirement Systems ("Kentucky Retirement") in this litigation coincide with the interests of the Commonwealth. Both the Commonwealth and Kentucky Retirement assert that KRS 61.637(17) is constitutional; however, with respect to the issue at hand in this appeal, Kentucky Retirement did not join with the Commonwealth in its Motion to Dismiss the Commonwealth as a Defendant. In fact, Kentucky Retirement contends that the Commonwealth is a proper party to this litigation. Kentucky Retirement has responsibilities under KRS 61.645 regarding the administration and application of retirement statutes, and the management of the Systems; however defending the constitutionality of statutes is not a duty described in Kentucky Retirement's statutory scheme, and certainly not a duty exclusively assigned to Kentucky Retirement.

The General Assembly enacted HB1 with little or no input from Kentucky Retirement. Since the Attorney General's client drafted and enacted HB1, the Attorney General is in the best position to defend the constitutionality of the statute. At the least, the Commonwealth should remain a party to the litigation, whether or not the Attorney General elects to defend its client. The Commonwealth is better situated than Kentucky Retirement to defend the constitutionality of HB1, and should be required to participate in the defense of the statute.

The Commonwealth evidently views this action as a "test case" and asks this Court to make new law. The Commonwealth has called the present issue one of first impression, however Jewish Hospital Healthcare Svcs. Inc. v. Louisville/Jefferson Co. Metro Government, 270 S.W.3d 904 (Ky. App. 2008), discussed later in this brief, dispels that notion based on reasoning utilized by the Kentucky Supreme Court in other opinions. A test case is unnecessary. The law is clear that sovereign immunity does not prevent the filing of declaratory judgment actions against a governmental entity concerning the validity of legislation. Moreover, following the analysis of the Court of Appeals, sovereign immunity of the Commonwealth has been expressly waived in that Kentucky Retirement is an agency of the Commonwealth, and KRS 61.645 permits actions to be filed against the Commonwealth. This premise has been adequately set forth in the Court of Appeals Opinion, and the Aubrey Appellees are expected to capably address this rationale.

KRS 418.075 assigns the Attorney General certain responsibilities where the constitutionality of legislative enactments is questioned. On January 22, 2009, the Attorney General filed a Notice of Intention Not to Intervene in this action to defend the statute's constitutionality. Having declined to voluntarily defend the constitutionality of the statute, the Attorney General's office also seeks to have the Commonwealth dismissed entirely from this

litigation if the Commonwealth's Appeal is sustained. The two concepts are separate. The Attorney General is charged with representing the Commonwealth in all actions in which the Commonwealth has an interest. KRS 15.020. Whether or not the Attorney General's office elects to defend this litigation does not automatically entitle the Commonwealth to be dismissed as a party.

ARGUMENT

I. THE CONCEPT OF SOVEREIGN IMMUNITY DOES NOT PRECLUDE A DECLARATORY JUDGMENT ACTION AGAINST THE COMMONWEALTH

The present action is brought under Chapter 418, which expressly permits actions to be maintained by any person whose rights are affected by statute. See KRS 418.045. While Kentucky Retirement denies the Aubrey Appellees' contention that KRS 61.637(17) is unconstitutional, the Petition at least alleges that the Plaintiffs' rights have been affected by legislation, and therefore a cause of action is properly asserted against the Commonwealth. As permitted by KRS Chapter 418, the Plaintiffs are merely seeking a determination of the rights of the parties and the constitutionality of the statute; and as required by KRS 418.075, the Commonwealth is a necessary party because it has an interest that would be affected by the litigation.

The mere determination of validity of the statute is a separate and discrete issue from the award of recovery of damages. This distinction has been recognized by the State of Mississippi in State v. Hinds County Board of Supervisors, 635 So.2d 839 (Miss., 1994), a case cited with approval in Colonial Pipeline Company v. Morgan, 263 S.W.3d 827 (Tenn., 2008), the Tennessee case cited by the Commonwealth in its brief. State v. Hinds County was an action where the State itself was a defendant, along with state officials. The Mississippi Court held that

no sovereign immunity existed for the State when the relief sought was a declaration that a particular statute or action of the state is unconstitutional.¹ Mississippi has properly recognized the distinction between a declaratory judgment proceeding and the separate issue of an award of damages. The rationale is applicable to the present appeal.

There is simply no Kentucky authority that supports the Commonwealth's contention that it enjoys sovereign immunity against the mere request for a declaration of unconstitutionality. It is for this reason that the Commonwealth relies heavily on the Tennessee case, Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827 (Tenn. 2008). Well established Kentucky law is contrary to the Commonwealth's position. The mere determination of constitutionality and rights under the statute is a permissible cause of action under Chapter 418.

In Jewish Hospital Healthcare Svcs. Inc. v. Louisville/Jefferson Co. Metro Government, *supra*, the Kentucky Court of Appeals stated that, "the Kentucky Supreme Court has held that governmental bodies and their officials do not enjoy sovereign immunity from declaratory judgment actions concerning the constitutionality of their actions." Jewish Hospital Healthcare Svcs. Inc. v. Louisville/Jefferson Co. Metro Government, 270 S.W.3d 904 (Ky. App. 2008) (citing Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989) and Jones v. Bd. Of Trustees of Kentucky Retirement Systems, 910 S.W.2d 710, 713 (Ky. 1995)).

The court in Jewish Hospital ultimately found that although the Louisville/Jefferson County Metro Government was shielded by the hospital's claim for payment for the care of indigent inmates based on theories of unjust enrichment or under the takings clause, sovereign

¹ The opinion also concluded by holding that there could be no recovery against the State because of certain Mississippi statutory provisions precluding that remedy; however the distinction between a declaration of unconstitutionality and further relief is exactly the distinction that Kentucky Retirement is attempting to make in this brief.

immunity did not apply to the hospital's declaratory judgment action and that such action should have been heard on the merits.

The cases relied upon in the Jewish Hospital opinion support the premise that sovereign immunity does not protect government bodies and their officials from constitutional challenges pursuant to the declaratory judgment act. In Jones, for example, the Kentucky Supreme Court held that the named Appellants (various government officials, including the Governor) did not have immunity, specifically finding that:

It would undermine and destroy the principle of judicial review to hold that the General Assembly could act with immunity, contrary to the Kentucky Constitution. Any such holding would leave citizens of this Commonwealth with no redress for the unconstitutional exercise of legislative power. This we will not do.

Jones, *supra* at 713.

In Jones, the Kentucky Employees Retirement Systems filed a petition for declaratory judgment against the governor and other state officials to challenge a provision in the budget bill which set employer contribution rates for the Commonwealth that differed from the rates recommended by the Board of Trustees, claiming that the legislation violated Section 19 of the Kentucky Constitution by impairing the inviolable contract between the Commonwealth and its employees established by KRS 61.692. Although the Court ultimately found no such violation, it considered the declaratory judgment action on the merits rather than protecting potentially unconstitutional government action under the guise of sovereign immunity. This Court should follow the established precedent in Jones and allow a full consideration of this action on the merits rather than direct dismissal based on sovereign immunity.

The Rose case cited by the Court of Appeals in Jewish Hospital is similarly compelling. In Rose, *supra*, the Council for Better Education, a group comprised of local school districts, along with certain other school districts and individual students, brought a declaratory judgment

challenging the constitutionality of the Commonwealth's public school system and its funding. The named defendants included the Governor, Superintendent of Public Instruction, President Pro Tempore of the Senate, Speaker of the House of Representatives, State Board of Education and its members. Although sovereign immunity was not addressed directly by the Court, it did permit a declaratory action against the General Assembly and other state officers where the constitutionality of the state's educational system was at issue.

The Jones case cited above discusses the import of the Court's decision in Rose that the General Assembly was properly before the Court in a declaratory judgment action even where the Speaker of the House and President of the Senate were the only members of the General Assembly named as parties.² See Jones, *supra* at 713. The Rose court, in determining that the General Assembly was properly a party to the action, noted that, "While it is certainly true that the named Appellants in the instant case cannot, by themselves, enact any legislation, they can defend the constitutionality of an act or acts." Rose, *supra* at 204.

Thus, it is clear from the relevant case law that the Commonwealth and its officers are not immune from suits brought pursuant to the declaratory judgment act challenging the constitutionality of government action or failure to act. The Commonwealth in the present action asserts that the officers must themselves be sued but the Commonwealth cannot be named a party. The Jewish Hospital opinion, *supra*, expressly rebuts that assertion, and employs the Supreme Court's rationale in Jones and Rose to eliminate the perceived necessity of utilizing the legal fiction of naming officers instead of the Commonwealth itself.

² This opinion was prior to the enactment of KRS 418.075 (4).

II. KENTUCKY'S DECLARATORY JUDGMENT ACT WAIVES SOVEREIGN IMMUNITY AND PERMITS THE FILING OF ACTIONS AGAINST THE COMMONWEALTH

Further clarifying the exclusion from sovereign immunity for the Commonwealth in declaratory judgment actions is the plain language of Kentucky's declaratory judgment act. KRS 418.075 requires that "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." Accordingly, KRS 418.075 requires that the Commonwealth be named a party when deciding the constitutionality of HB 1.

In the present appeal, the Commonwealth argues, and the Court of Appeals has concluded, that the omission of the Commonwealth within the KRS 418.085 definition of the word "person" entitles the Commonwealth to be dismissed as a party in such litigation. KRS respectfully disagrees with that analysis.

The Commonwealth has often been named as a defendant in declaratory judgment actions to determine the constitutionality of legislation. Several reported opinions exist where the Commonwealth of Kentucky was a named defendant in a declaratory judgment action and the action was permitted to proceed. See City of Louisville v. Commonwealth, 468 S.W.2d 295 (Ky. 1971), Associated Industries of Kentucky v. Commonwealth, et al, 912 S.W.2d 947 (Ky. 1995) and Foley v. Commonwealth, 306 S.W. 3rd 28 (Ky. 2010). Counties have also been named defendants in declaratory judgment actions, despite the fact that counties are considered to be subdivisions of the Commonwealth with sovereign immunity. Jewish Hospital, supra, 270 S.W.3d 904, at p. 907. See Rea v. Gallatin County Fiscal Court, 422 S.W.2d 134 (Ky., 1967). Of course, sovereign immunity may prevent recovery from or an award against the Commonwealth, but no such recovery is being sought in the present action.

In addition, KRS 418.075 (1), which requires notification of the Attorney General in certain cases, is not rendered redundant, as suggested by the Court of Appeals on page 12 of its Opinion, if the Commonwealth is considered a person under KRS 418.075. KRS 418.075 (1) only requires that the Attorney General be served if the validity of a statute is questioned. There are many circumstances where the validity of a statute may be questioned that do not involve a claim against the Commonwealth.³ Whether or not the Commonwealth is a named defendant, the Attorney General is required to be notified in order that he or she may defend the challenge to validity if desired. Therefore, KRS 418.075 (1) is not redundant if the Commonwealth is considered to be a proper party defendant in a declaratory judgment action.

The prohibition of actions against the Commonwealth to determine the validity of legislation would be a narrow and restrictive interpretation of the law. Such construction would be at odds with the legislative intent to afford liberal interpretation and administration to KRS 418.040 to KRS 418.090. See KRS 418.080.

**III. THE BOARD'S POSITION HAS EVIDENTLY BEEN MISCONSTRUED
BY THE COURT OF APPEALS, NOTWITHSTANDING THAT
THE BOARD SUPPORTS THE AFFIRMATION OF THE
COURT OF APPEALS OPINION**

Notwithstanding the fact that KRS supports the holding of the Court of Appeals, Kentucky Retirement is puzzled by comments on page 19 of the Court of Appeals Opinion. The Board seeks to address the same for purposes of clarification. The Opinion, in answering Kentucky Retirement's contention that the Commonwealth should be required to defend the constitutionality of its statutes, observed in support of that conclusion that the Board of Kentucky Retirement itself has instituted a constitutional challenge to the retirement statutes. This

³ For example, in an action for recovery on a statutory cause of action, a defendant may plead in defense that the statute is invalid. Such a defense would not require that the Commonwealth be named a party, however the Attorney General would have to be given notice as required by KRS 418.075 (1).

observation supports, rather than rebuts, the Board's position. In the present case as well as in the case cited in the Opinion, the Commonwealth should be required to defend the constitutionality of the statute. The Opinion also stated that "Kentucky case law shows cases wherein that Kentucky Retirement participated with the Attorney General's office in defending the constitutionality of the retirement statutes." That is exactly the scenario that Kentucky Retirement is advocating in the present appeal. The Commonwealth and Kentucky Retirement should be defending this case together, rather than Kentucky Retirement alone.

These statements in the Opinion indicate that the Court of Appeals may have misconstrued the position of Kentucky Retirement. Kentucky Retirement does not seek to be relieved of responsibility for defending KRS 61.637 (17) as does the Attorney General. Kentucky Retirement has the right and the intention to vigorously defend its position in this litigation. Kentucky Retirement contends only that the Commonwealth should not be dismissed from the lawsuit so that Kentucky Retirement is left to defend the statute alone.

**IV. THE INVIOLEABLE CONTRACT IS BETWEEN THE
COMMONWEALTH AND ITS EMPLOYEES, AND THEREFORE
THE COMMONWEALTH IS A PROPER PARTY**

Finally, the inviolable contract described in KRS 61.692 is between the Commonwealth and its employees and other members as defined by statute. The contract is not with the Board of Trustees of Kentucky Retirement Systems. This language itself constitutes a waiver of sovereign immunity by the Commonwealth. The Commonwealth, rather than Kentucky Retirement Systems, is the employer of the state employees who have the inviolable contract. Accordingly, the Commonwealth is a proper party.⁴


⁴ Again, The Board disputes that KRS 61.637 (17) is unconstitutional, or that the Aubrey Appellees' "inviolable contract" rights have been violated. It is hoped that the Commonwealth will be required to join the Board in defending the constitutionality of its statutes.

CONCLUSION

For the reasons set forth above, the trial court's decision must be affirmed and the Commonwealth cannot be dismissed as a party to this declaratory judgment action. Accordingly, the Opinion of the Court of Appeals and the Order of the Franklin Circuit Court should be affirmed.

Respectfully submitted,

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