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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000728-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 09-CI-00087

JOHN AUBREY; AND OTHER INDIVIDUAL APPELLEES AS DESIGNATED IN THE NOTICE OF APPEAL — APPELLEES

OPINION
AFFIRMING

* ** ** ** **

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,[1] SENIOR JUDGE.

CLAYTON, JUDGE: The Commonwealth of Kentucky appeals the Franklin Circuit Court's denial of its motion to dismiss on the grounds that its sovereign immunity bars actions against it in the Declaratory Judgment Act, KRS Chapter 418. After careful consideration, we affirm.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

FACTUAL AND PROCEDURAL BACKGROUND

Originally, John Aubrey and other appellees (hereinafter "Aubrey appellees") filed an action seeking declaratory judgment and injunctive relief. On February 12, 2009, the court denied the Aubrey appellees' request for injunctive relief. Then, on February 25, 2009, the Commonwealth moved to dismiss the suit against it on the grounds of sovereign immunity. The Commonwealth maintained that sovereign immunity is not waived in declaratory judgment actions. After informing the court that they were no longer seeking injunctive relief but only a declaratory judgment, the Aubrey appellees, in their response, contended that the Commonwealth has been a party to declaratory judgment actions before and that no legal basis exists to excuse the Commonwealth in this action.

Plaintiffs, now Aubrey appellees, are members of the County Employees Retirement Systems (hereinafter "CERS"), which is administered by the Board of Trustees of the Kentucky Retirement Systems under KRS 78.780. The statute under discussion, KRS 61.637(17), was enacted as part of HB1 during the 2008 Extraordinary Session of the General Assembly. HB1 was a complete revision of the public employee retirement plan. Specifically, KRS 61.637(17) governs retired government workers' right to receive retirement benefits upon reemployment. The Aubrey appellees were seeking a declaration that KRS 61.637(17) is unconstitutional and contrary to other Kentucky statutes.

In addition, after the Commonwealth filed its appeal, the Kentucky Retirement Systems tendered an appellee brief. Although the interests of the

Kentucky Retirement Systems coincide with the Commonwealth regarding the constitutionality of the statute, it is not a party to the Commonwealth's motion to dismiss on the basis of sovereign immunity. Kentucky Retirement Systems believes that the Commonwealth should be required to defend the constitutionality of its own statute rather than leaving this responsibility to various departments and agencies within the Commonwealth. Hence, Kentucky Retirement Systems disputes the Commonwealth's contention that a declaratory judgment action, which concerns the constitutionality of a statute, is barred under the Declaratory Judgment Act (hereinafter "DJA") by sovereign immunity.

On April 8, 2009, Franklin Circuit Court entered an order denying the Commonwealth's motion to dismiss and holding that, because declaratory judgment actions do not impose tort liability upon the Commonwealth or its agencies, the Commonwealth is not barred by sovereign immunity from participation in declaratory judgment actions. From this decision, the Commonwealth now appeals.

STANDARD OF REVIEW

A determination of whether the defense of sovereign immunity applies is a question of law for our Court. In such cases, the standard of review is de novo. *Floyd County Bd. of Educ. v. Ratliff*, 955 S.W.2d 921 (Ky. 1997).

ISSUE

The issue is whether sovereign immunity serves as a bar to declaratory judgment actions that are not seeking monetary recompense but are challenging the constitutionality of a statute, in this case, KRS 61.637(17). The Commonwealth argues that sovereign immunity bars all suits against it, including declaratory judgment actions, unless the Commonwealth has explicitly waived its immunity. It asserts that it has not waived sovereign immunity in the DJA. The Aubrey appellees counter that the Commonwealth did waive sovereign immunity in KRS 61.692 and KRS 418.075(4). And the Kentucky Retirement Systems maintains that while its duties and responsibilities, as stated in KRS 61.645, are to administer the application of the retirement statutes, defending the constitutionality of the statues is not listed as one of its statutory obligations. Hence, the Kentucky Retirement Systems reasons that, based on the Attorney General's statutory responsibilities to defend the constitutionality of statutes, the Attorney General should represent the Commonwealth and defend this challenge to the constitutionality of KRS 61.637(17).

SOVEREIGN IMMUNITY

"[S]overeign immunity is a concept that arose from the common law of England." *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001). It is defined as "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*. citing Restatement (Second) of Torts § 895B(1) (1979). This principle was recognized as applicable to the Commonwealth of Kentucky as early

as 1828. *Divine v. Harvie*, 7 T.B. Mon. 739, 23 Ky. 439, 441, 1828 WL 1295 (Ky. App. 1828).

Although no Kentucky case specifically enumerates the reasons for the doctrine of sovereign immunity, it was well-stated in the Virginia case, *Messina v. Burden*, 228 Va. 301, 308, 321 S.E.2d 657, 660 (Va. 1984):

> [T]he doctrine of sovereign immunity serves a multitude of purposes including but not limited to protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation.

Kentucky courts have specifically discussed another rationale for sovereign immunity, that is sovereign immunity is grounded in the separation of powers doctrine that courts "should not be called upon to pass judgment on policy decisions made by members of coordinate branches of government . . . because such actions furnish an inadequate crucible for testing the merits of social, political or economic policy." *Yanero*, 65 S.W.3d at 519.

Certainly, the doctrine of sovereign immunity, as embodied in the Kentucky Constitution Section 231, prohibits claims against the government treasury absent the consent of the sovereign.

> As noted in *Reyes v. Hardin Memorial Hospital*, [55 S.W.3d 337, 338 (Ky. 2001)], the words "sovereign immunity" are not found in the Constitution of Kentucky. Rather, sovereign immunity is a common law concept recognized as an inherent attribute of the state. Thus, contrary to assertions sometimes found in our case law,

> Sections 230 and 231 of our Constitution are not the source of sovereign immunity in Kentucky, but are provisions that permit the General Assembly to waive the Commonwealth's inherent immunity either by direct appropriation of money from the state treasury (Section 230) and/or by specifying where and in what manner the Commonwealth may be sued (Section 231).

Yanero, 65 S.W.3d at 523-24 (internal citations omitted).

Even though the defense of sovereign immunity usually arises in tort claims, the doctrine of sovereign immunity has also been applied in contract actions and has given the Commonwealth immunity from suits for breach of contract. *University of Louisville v. Martin*, 574 S.W.2d 676 (Ky. App. 1978); *see also Foley Const. Co. v. Ward*, 375 S.W.2d 392 (Ky. 1964). Furthermore, besides tort and contract claims, the Kentucky Supreme Court has held that Section 231 of the Kentucky Constitution and the doctrine of sovereign immunity foreclose against the state or one of its agencies "claims of violation of statutes." *Ammerman v. Board of Educ., of Nicholas County*, 30 S.W.3d 793 (Ky. 2000). Finally, in two unpublished cases, our courts have acknowledged that equitable actions against the Commonwealth are barred by sovereign immunity. *Whittenberg Construction Co. v. University of Kentucky*, 2007 WL 3037721 (Ky. App. 2007)(2006-CA-002028-MR), and *Harmon v. Com.*, *Justice Cabinet,* 2008 WL 4367833 (Ky. App. 2008)(2005-CA-002459-MR).

KENTUCKY DECLARATORY JUDGMENT ACT

The Kentucky DJA is codified as KRS 418.040 to KRS 418.090. It provides that in any action "in a court of record . . . wherein . . . an actual

controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding [judgment.]" KRS 418.040. In general, the scope of matters to which a declaratory judgment may be rendered is broad. KRS 418.045 contains an extensive list of claims for which declaratory relief is available:

> Any person interested under a deed, will or other instrument of writing, or in a contract, written or parol; or whose rights are affected by statute, municipal ordinance, or other government regulation; or who is concerned with any title to property, office, status or relation; or who as fiduciary, or beneficiary is interested in any estate, provided always that an actual controversy exists with respect thereto, may apply for and secure a declaration of his right or duties, even though no consequential or other relief be asked. The enumeration herein contained does not exclude other instances wherein a declaratory judgment may be prayed and granted under KRS 418.040, whether such other instance be of a similar or different character to those so enumerated.

KRS 418.045 bears the title "[p]ersons who may obtain declaration of rights; enumeration not exclusive." In other words, this section of the Kentucky DJA, enumerating certain specific situations, is not exclusive as to other situations. Actions for declaratory judgment did not exist as common law and, therefore, are creatures of the twentieth century. Logically, since declaratory judgment actions are not found in common law, no common law exception to sovereign immunity exists. Therefore, the question becomes did the General Assembly consent or waive, explicitly or implicitly, the Commonwealth's sovereign immunity in declaratory judgment actions. This particular declaratory judgment action

concerns the constitutionality of a certain statute. This specific question is one of first impression in our Commonwealth.

ANALYSIS

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). The Kentucky Constitution § 231, states that the "General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." The first step to ascertain whether declaratory judgment actions are subject to sovereign immunity is to examine the applicable statutes to determine whether the General Assembly waived the Commonwealth's inherent immunity in the DJA.

Guidance is provided in *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997), wherein the Kentucky Supreme Court held that the state cannot be sued except upon a specific and explicit waiver of sovereign immunity. The Court went on to expound that "[w]e will find waiver 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." *Id*. at 346 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S. Ct. 1347, 1361, 39 L. Ed. 2d 662 (1974), and *Murray v. Wilson Distilling Co*., 213 U.S. 151, 171, 29 S. Ct. 458, 464-65, 53 L. Ed. 742 (1909)). Here, the Commonwealth has pointed out that no explicit language waiving sovereign immunity is found in KRS Chapter 418, the

DJA. Yet, according to *Withers*, the state cannot be sued in its own courts unless expressly permitted by the General Assembly or by implied waiver where there can be no other reasonable interpretation. *Withers, id*.

The Aubrey appellees argue that the real question is not whether sovereign immunity is expressly waived in the DJA, but rather if the statute at issue in the complaint meets the *Withers* criteria for waiver of sovereign immunity. According to the appellees' reasoning, KRS 418.045 necessitates that plaintiffs have some sort of independent right, duty or other legal relation to access the DJA. The appellees opine that the DJA is not a remedial statutory scheme but a procedural one that establishes the manner in which courts may litigate the rights of litigants. They argue that, in this case, an independent right exists under KRS Chapter 61 to access the DJA provisions and name the Commonwealth as a party. Under their reasoning, the sovereign immunity analysis does not pertain to the DJA but rather to KRS Chapter 61.

The basis for appellees' argument relies on language in KRS 61.692:

> It is hereby declared 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 61.510 to 61.705 shall, except as provided in KRS 6.696 effective September 16, 1993, constitute an inviolable contract of the Commonwealth, and the benefits provided therein shall, except as provided in KRS 6.696, not be subject to reduction or impairment by alteration, amendment, or repeal.

From this language the Aubrey appellees conclude that, based on the inviolable contract between employees and the Commonwealth, the Commonwealth is the

proper party. Hence, since according to the Aubrey appellees, the Commonwealth's sovereign immunity has been waived under this Chapter, it (the Commonwealth) must be a party to this action and defend the constitutionality of KRS 61.637(17). We are cognizant of the Commonwealth's contention that the Court should not consider this argument since it was not presented until the Aubrey appellees' reply brief. Since the issue is not dispositive, we will address it.

We note, however, that the language in KRS 61.692 does not *explicitly* waive the Commonwealth's sovereign immunity. Notwithstanding that the language may have constitutional implications, the mere listing of the "Commonwealth" as party to a contract is not a definite waiver of sovereign immunity. The words only comprise a possible contractual relationship. Furthermore, as mentioned above, the doctrine of sovereign immunity has been applied in contract actions and found to provide the Commonwealth sovereign immunity from suits for breach of contract. *See University of Louisville v. Martin*, 574 S.W.2d 676 (Ky. App. 1978); *see also Foley Const. Co. v. Ward*, 375 S.W.2d 392 (Ky. 1964).

In its brief, the Commonwealth does discuss the necessary parties to a declaratory relief action. The parties are designated in KRS 418.075:

> 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.

Further, "person" is defined in KRS 418.085 as:

> The word "person" wherever used in KRS 418.040 to 418.090, shall be construed to mean any person, partnership, joint stock company, incorporated association, or society, or municipal or other corporation of any character whatsoever.

This definition of person does not mention the Commonwealth or any of its departments, boards, and agencies. The Commonwealth argues that if the General Assembly had waived sovereign immunity in the DJA, it would have listed the Commonwealth and its various entities specifically.

Another reason that the Commonwealth claims that sovereign immunity was not waived in the DJA is the statutory proscription that demonstrates the purely voluntary nature of the Commonwealth's participation in declaratory judgment actions.

> (1) 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.

KRS 418.075(1). So, not only is the Commonwealth not listed in the DJA's definition of person, but also the Commonwealth's participation is explained with particularity in the DJA. The Commonwealth thus maintains that if sovereign immunity had been waived in the act, this statutory proscription would have been redundant.

Turning to the arguments of the Aubrey appellees we note that they assert that the Kentucky Supreme Court held that governmental bodies and their

officials do not enjoy sovereign immunity from declaratory judgment actions concerning the constitutionality of their actions. Furthermore, at the conclusion of oral arguments, we granted permission for the parties to file supplemental briefs to discuss the impact of *Jewish Hosp. Healthcare Services, Inc. v. Louisville/Jefferson County Metro Government*, 270 S.W.3d 904 (Ky. App. 2008). Our Court stated therein:

> It is true 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. *See*, *e.g., Rose v. Council for Better Education, Inc*., 790 S.W.2d 186 (Ky. 1989*); Jones v. Bd. of Trustees of Kentucky Retirement Systems,* 910 S.W.2d 710, 713 (Ky. 1995).

Id. at 908. Appellants insist that, because the Commonwealth was not a defendant in the two cases cited in *Jewish Hospital*, this case does not apply. And it argues that when public officials act in compliance with an unconstitutional statute, then the official is acting outside the law and, thus, not entitled to absolute immunity even though the official is following the law. Respectfully, this reasoning is inapplicable to the purview of this particular issue.

First, *Rose* involved multiple plaintiffs, including the Council for Better Education, Inc., a non-profit Kentucky corporation whose membership consists of sixty-six local school districts in the state that filed a declaratory judgment action in the Franklin Circuit Court. The plaintiffs were challenging the constitutionality of the Commonwealth's public school system and its funding. Although sovereign immunity was not directly addressed here by the Court, the

declaratory judgment action against the General Assembly and other state officers was permitted.

Next, in *Jones*, the Kentucky Supreme Court held that various governmental officials, including the governor, did not have immunity. The Supreme Court therein said:

> 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, 910 S.W.2d at 713. We will not do here what the Supreme Court refused to do in *Jones*, that is, leave citizens without recourse to challenge the unconstitutional exercise of legislative power.

While no explicit waiver of sovereign immunity is contained in the DJA, its purposes and its legal history demonstrate an implicit waiver of sovereign immunity for the purposes of ascertaining whether a statute is constitutional. For example, in *Philpot v. Patton*, 837 S.W.2d 491, 493-94 (Ky. 1992), the Kentucky Supreme Court, relying on *Rose,* acknowledged that:

> *Rose* held the General Assembly is not immune from suit in a declaratory judgment action to decide whether the General Assembly has failed to carry out a constitutional mandate and that members of the General Assembly are not immune from declaratory relief of this nature simply because they are acting in their official capacity. *Rose* held a declaratory judgment over constitutionality is not limited to deciding the constitutionality of statutes, but extends to failure to enact statutes complying with constitutional mandate.

Based on case law and our own reasoning, we believe that the Commonwealth is not barred by sovereign immunity from participation in the DJA. Finally, *Baker v. Fletcher*, 204 S.W.3d 589 (Ky. 2006), by appellant's own admission, did not overrule *Rose*. Therefore, *Baker* is not relevant to whether the Commonwealth may be sued under the DJA in an action to determine the constitutionality of a statute.

The General Assembly in 2003, some years after the *Jones* decision, amended KRS 418.075 and added the following subsection.

> (4) Pursuant to Sections 43 and 231 of the Constitution of Kentucky, members of the General Assembly, organizations within the legislative branch of state government, or officers or employees of the legislative branch shall not be made parties to any action challenging the constitutionality or validity of any statute or regulation, without the consent of the member, organization, or officer or employee.

The Aubrey appellees contend that, since the General Assembly has now provided itself with sovereign immunity under the DJA, it is even more significant for the Commonwealth to step in so that the citizens are able to challenge and rectify constitutional and statutory violations by government. The Aubrey appellees bolster this argument by noting that cases about the constitutionality of statutes have already been heard under the DJA. Indeed, the Commonwealth does not disagree that constitutional actions may be maintained under the DJA.

Clearly, the Commonwealth has the prerogative to be involved in every case regarding the validity and constitutionality of statutes. *See* KRS 418.075(1). And the Commonwealth submits that, under the DJA, anyone

bringing an action must fit the definition of "person" found in the statute. Here, the Aubrey appellees are not left without a remedy because, as the Commonwealth suggests, the Kentucky Retirement Systems is the proper defendant in the underlying action. The Kentucky Retirement Systems is a "person" pursuant to KRS 418.085 since corporations qualify as a "person." KRS 61.645(2)(a) expressly authorizes that the Board of Trustees of the Kentucky Retirement Systems can "sue and be sued in [the] corporate name."

Lastly, we are not persuaded by the Kentucky Retirement Systems' assertions that the Attorney General should, and is in a better position than it to do so, defend challenges to the constitutionality of statutes. The Kentucky Retirement Systems points out two cases: *Associated Industries of Kentucky v. Com.*, 912 S.W.2d 947 (Ky. 1995), and *Texaco, Inc. v. John Martin, Distributor, Inc.*, 472 S.W.2d 674 (Ky. 1971). It claims that these two cases support the proposition that the Commonwealth is customarily named a defendant in declaratory judgment actions filed in order to ascertain the constitutionality or validity of government action. Whether these two cases establish that the Commonwealth is customarily named a defendant in declaratory judgment actions is not for us to say. But the issue here is not whether the Commonwealth may participate in declaratory judgment actions but whether sovereign immunity operates as a bar if the Commonwealth chooses not to participate. These cases do not support that sovereign immunity has been waived in the DJA because the case does not provide

any explicit language to show that the legislature explicitly barred sovereign immunity.

Additionally, the decision by the Commonwealth not to use the defense of sovereign immunity in *Associated Industries* did not establish or set the precedent that sovereign immunity has been waived in the DJA. The Kentucky Retirement Systems' declaration, that because, in *Texaco,* the Commonwealth's Department of Revenue was named an indispensible party, is not on point. As is stated therein:

> The posture of this case is not such as to make it appropriate for this court to rule in this case on the constitutionality of the statutes as they existed after July 1, 1962. The Department of Revenue is an indispensable party to a determination of the issue, and in accordance with KRS 418.075 the Attorney General should be given the opportuity [sic] to be heard. The circuit court is the proper place for the determination initially to be made, with all interested parties participating. Accordingly, we are remanding the case with directions that the Department of Revenue be made a party, the Attorney General be served in accordance with KRS 418.075, and that the issue of validity of the taxes imposed after July 1, 1962, be tried and determined, which determination will answer the question of the defendant's liability to the plaintiff for those taxes. As to the taxes imposed prior to July 1, 1962, the plaintiff's claim shall be dismissed.

Id. at 678. Here, as has been argued by the Commonwealth, the Attorney General's participation was elective.

The Kentucky Retirement Systems suggests that the Attorney General is in a better position to defend the constitutionality of KRS 61.637(17) than is the Kentucky Retirement Systems because the General Assembly drafted the

legislation. Notwithstanding KRS 418.075(4), we disagree with the Kentucky Retirement Systems' elucidation. First, the Kentucky Retirement Systems' statement that, because the General Assembly drafted the legislation without input from the Kentucky Retirement Systems, it is not in a position to defend the statute's constitutionality is disingenuous. The General Assembly drafts and passes legislation regularly that affects many different people and agencies of the Commonwealth. The fact that the General Assembly, under the separation of powers doctrine, is responsible for the legislative function of the government does not relieve other governmental agencies' responsibilities with regard to the implementation and administration of fair, effective, and constitutional laws.

In addition, it is perfectly suitable that the Kentucky Retirement Systems defends the constitutionality of the statutes it administers. As a matter of fact, the Board itself instituted a constitutional challenge to the retirement statutes in a previously cited case, *Jones,* 910 S.W.2d at 713. Moreover, Kentucky case law shows cases wherein the Kentucky Retirement Systems participated with the Attorney General's office in defending the constitutionality of the retirement statutes. *See Weiand v. Board of Trustees of Kentucky Retirement Systems*, 25 S.W.3d 88 (Ky. 2000).

Another contention of the Kentucky Retirement Systems is that no Kentucky authority exists to support the proposition that, because sovereign immunity bars the award of damages against the Commonwealth, sovereign immunity also acts, under the DJA, as a bar to actions against the Commonwealth

for a mere declaration of unconstitutionality. To us, this argument seems to be a distinction without a difference. The Commonwealth has sovereign immunity, which may only be waived explicitly by the legislature. Moreover, we are having difficulty comprehending the reason that both the Aubrey appellees and the Kentucky Retirement Systems are so adamant about the inclusion of the Commonwealth. The results emanating from the determination of the constitutionality of this statute will be the same regardless of the party sued.

To conclude our analysis, we must explain that it is extremely important that Kentucky citizens have recourse to challenge statutes that might be invalid or unconstitutional. Although we do not contemplate a situation wherein citizens would not be able to make these challenges nor have the Aubrey appellees or the Kentucky Retirement Systems given us such a scenario, we are concerned about the potentiality. Here, the Aubrey appellees have sued not only the Commonwealth but also the Kentucky Retirement Systems. Thus, the sovereign immunity bar in the DJA does not prevent the suit from going forward, and Aubrey appellees have a remedy. They have and may continue with the suit against the Kentucky Retirement Systems.

Even though the Aubrey appellees have a party for suit, we are not convinced by the Appellant's interpretation of the "commonwealth." Commonwealth is defined in Black's Law Dictionary, 295 (8th ed. 2004), as "a nation, state, or other political unit." In our opinion, the fact that the Kentucky Retirement Systems is an appropriate body to be sued by the appellees renders the

issue concerning sovereign immunity and the commonwealth irrelevant. Because the Kentucky Retirement Systems is part of the Commonwealth of Kentucky, to say that the Attorney General does not have to defend against this suit because sovereign immunity protects it from suit under the declaratory judgment act is disingenuous. Clearly, constitutional challenges have been addressed against the Commonwealth in declaratory judgment acts. (*See Rose,* 790 S.W.2d 186; *Jones,* 910 S.W.2d 710; *Jewish Hospital,* 207 S.W.3d 904) In addition, in the case at hand, the Appellant has conceded that the Kentucky Retirement Systems can be sued because of an express waiver.

Therefore, it is convoluted reasoning to suggest that the Commonwealth*, i.e.,* the Attorney General, is protected by sovereign immunity under the declaratory judgment act, but the Retirement Systems is not. Both the Kentucky Retirement Systems and the Attorney General are parts of the Commonwealth. Support for this proposition is found in *Jewish Hospital.* The Court held not only that governmental bodies are not immune from declaratory judgment acts concerning issues of constitutionality but also that the metro government was an arm of the state. *Jewish Hospital*, 270 S.W.3d at 907. We analogize that here, too, the Kentucky Retirement Systems is an arm of the state.

It is a chimera to view the statutory scheme for sovereign immunity as applying merely to one part of the Commonwealth - the Attorney General's office - but not to the Kentucky Retirement Systems. If sovereign immunity does not protect one part of the Commonwealth - the Kentucky Retirement Systems - which

is an arm of the state, then it is merely illusionary to state that sovereign immunity does protect the Attorney General's office - also an arm of the state. Obviously, the Commonwealth, as can any respondent in a lawsuit, chooses not to defend itself in this suit and allow the Kentucky Retirement Systems to represent the Commonwealth. And, as the appellant noted during oral arguments, if the case should later come back to a higher court, the Attorney General may still decide to intervene under its statutory authority to defend the Commonwealth in constitutional challenges or as an amicus. In fact, the declaratory judgment act gives it this authority. Therefore, the Commonwealth/Attorney General has the prerogative to opt out of defending this suit and permit the Kentucky Retirement Systems to handle it. But the Commonwealth cannot also claim sovereign immunity. The umbrella of the Commonwealth fits over both entities.

CONCLUSION

Therefore, for the above-stated reasons, the trial court did not err in denying the Commonwealth's motion to dismiss on the basis of sovereign immunity. We affirm the decision of the trial court.

ALL CONCUR.

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