

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001985-MR

LINDA COLLINS AND
DONNA BALL

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 00-CI-00913

A. B. CHANDLER, III,
IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL; AND
JONATHAN MILLER,
IN HIS OFFICIAL CAPACITY AS
TREASURER OF COMMONWEALTH
OF KENTUCKY

APPELLEES

OPINION

AFFIRMING

** **

BEFORE: BUCKINGHAM, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Linda Collins and Donna Ball (hereinafter "the Appellants") appeal the Franklin Circuit Court's opinion and order on September 17, 2002, granting the Commonwealth of

Kentucky's, et. al, motion for summary judgment and dismissing their complaint as barred by sovereign immunity. We affirm.

The Appellants filed their complaint and petition for declaration of rights on August 20, 2000. In their complaint, Appellants requested a judgment declaring that all funds received by the Commonwealth of Kentucky pursuant to the settlement of the Tobacco Suit and the Master Settlement Agreement adopted by the Consent Decree and Final Judgment constitute monetary restitution under the Consumer Protection Act and that such funds be delivered to the court or a court-appointed receiver for proper distribution to such citizens of the Commonwealth who have suffered damage as a result of the actions of the tobacco companies. "The Tobacco Suit" the Appellants referred to was the civil lawsuit filed by the Attorney General of the Commonwealth, Albert B. Chandler, III, on December 18, 1998 in the Franklin Circuit Court against six tobacco companies (case number 98-CI-01579). "The Consent Decree and Final Judgment" referenced above is the judgment entered in said lawsuit by the Franklin Circuit Court on December 21, 1998, resolving the Tobacco Suit. "The Master Settlement Agreement" is the 124 page document setting forth the terms and conditions upon which the Tobacco Suit was settled among the tobacco companies, the Commonwealth and numerous other states.

Following the settlement in the Tobacco Suit, Appellants, claim that they, as consumers of tobacco products, have a vested right in a portion of the monetary proceeds resulting from the settlement under Kentucky's Consumer Protection Act, KRS §§ 367.100 et. seq. As such, they brought this action against the Commonwealth of Kentucky (hereinafter "the Commonwealth"), Albert B. Chandler, III (hereinafter "Chandler"), in his official capacity as the Attorney General of the Commonwealth of Kentucky, and Jonathan Miller (hereinafter "Miller") in his official capacity as Treasurer of the Commonwealth of Kentucky (collectively hereinafter "the Appellees"). Basically, Appellants allege that since the Tobacco Suit was brought under Kentucky's Consumer Protection Act and that since the Tobacco Suit alleged that as a result of the unlawful conduct of the tobacco companies, the Commonwealth and its citizens suffered damages, they should be entitled to recover a portion of the financial settlement. In the complaint, the Commonwealth alleged it and its citizens suffered damages based upon the financial burden incurred by its citizens for the cost of purchasing tobacco products, the cost of medical services for illnesses resulting from the use of tobacco products, and the diminution of quality of life and/or loss of life from various medical conditions associated with the use of tobacco products. Appellants also allege they are entitled to a

share of the monetary funds received from the settlement in that the settlement agreement provides that the settlement includes any and all claims that the Commonwealth asserted or could have asserted against the tobacco companies, including any and all claims that could have been asserted on behalf of the state's citizens seeking restitution under any consumer protection act.

The Appellees responded with a motion to dismiss arguing sovereign immunity, the statute of limitations, and failure to state a cause of action. The trial court denied the motion concluding that the Appellants "have sufficiently pleaded claims concerning [the Appellants'] authority to recover damages under the Consumer Protection Act." The matter then proceeded and subsequently the parties filed motions for summary judgment or partial summary judgment. Each motion was thoroughly briefed and extensive replies submitted to the court. Upon further consideration and after reviewing the arguments presented, the trial court eventually entered the September 17, 2002, opinion and order granting Appellees' motion for summary judgment and dismissing the complaint on the basis of sovereign immunity. This appeal followed.

On appeal, Appellants set forth two arguments as to why sovereign immunity is not applicable to their claims. First, they allege that the Tobacco Suit and the resulting Master Settlement Agreement was an illegal "taking" by the state

which is not barred by sovereign immunity. Second, they contend that they have a mandamus claim against Chandler and Miller for failing to properly perform their official duties and such a claim is not barred by sovereign immunity. We disagree with each of these contentions.

Appellants cite to numerous cases that support their contention that a taking claim against the government is not barred by sovereign immunity because Section 13 and Section 242 of the Kentucky Constitution provide that no person's property shall be taken for public use without just compensation. See Holloway Construction Co. v. Smith, Ky., 683 S.W.2d 248 (1984); Commonwealth v. Geary, Ky., 254 S.W.2d 477 (1953). At page six of their brief, Appellants state:

The appellants' complaint herein asserts a taking claim. The complaint asserts that the monies received by the Commonwealth of Kentucky in compromise and settlement of the Consumer Protection Act lawsuit it filed against the tobacco companies are required by the Consumer Protection Act to be distributed as restitution to the state's tobacco consumers and that the Commonwealth of Kentucky's failure to distribute such monies to the state's tobacco consumers constitutes a taking of their property without just compensation. (Footnote omitted).

While we agree with Appellants' statement that their complaint asserts a taking claim and that the Kentucky Constitution and the cases cited by Appellants support their argument that

sovereign immunity would not be applicable if the government was taking one's private property, we believe the trial court properly determined that under the facts alleged the Master Settlement did not affect any citizens' individual rights and that the monies recovered belonged exclusively to the states. In its order, the trial court held:

If the [Appellants] were successful, whether in their restitution claim or in their taking claim, their relief would be in the form of disbursement of funds from the Commonwealth's treasury. The Commonwealth is clearly protected from this type of interference with governmental function. See Ky. Const., Sec. 231; Withers v. University of Kentucky, Ky., 939 S.W.2d 340 (1997). Moreover, as agreed to by the tobacco companies and the participating states, the settlement funds were not apportioned into different claims. The funds are intended to provide education, research, and reimbursement of states' expenses in treating sick smokers and their families. See Floyd v. Thompson, 227 F.3d 1029, 1037 (7th Cir. 2000). This Court cannot ignore the purpose and intent of the Master Settlement Agreement. The tobacco companies and states resolved the claims which belonged exclusively to the states, see Skillings v. Illinois, 121 F.Supp.2d 1235, 1238 (C.D. Ill. 2000), making the settlement monies state funds to be distributed according to each state's needs. Therefore, regardless of the named parties to this suit, the real party in interest is the Commonwealth of Kentucky as there is really no way to categorize the relief sought by the [Appellants] other than as monetary relief. See Tate v. Salmon, 79 Ky. 540 (1881). The [Appellants] simply cannot sue the Commonwealth or State constitutional officers in their official capacity seeking

damages from the State treasury. See Ky. Const., Sec. 231; Withers v. University of Kentucky, Ky., 939 S.W.2d 340, 346 (1997), Foley Constr. Co. v. Ward, Ky., 375 S.W.2d 392, 393 (1963). See also Kentucky v. Graham, 473 U.S. 159, 165 (1985) (quoting Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690, n. 55 (1978)) ("[A] suit against a governmental officer 'in his official capacity' is the same as a suit 'against [the] entity of which [the] officer is an agent'"). As the [Appellants'] relief seeks to tap funds recovered under the Master Settlement Agreement that belong to the treasury of the Commonwealth, sovereign immunity bars the [Appellants'] suit. Therefore, this Court is without jurisdiction to consider the [Appellants'] remaining claims and the Complaint must be dismissed.

We agree with the trial court that Appellants' claims to the monetary funds recovered by Attorney General Chandler in the Tobacco suit are exclusively those of the Commonwealth and not any individual citizen. There was no taking by the government in the settlement of the Tobacco Suit and thus, Appellants have no claim to any state funds. To allow otherwise would be to violate our constitution.

By affirming the trial court as to the first issue raised by Appellants, we, in effect, render their second claim moot. Appellants' claim that a mandamus action seeking to compel a government official (in this case Chandler and Miller) to perform his ministerial duty under the law is moot based upon the determination that the funds recovered from the tobacco

companies are governmental and not any individual's funds. Appellants seek to have the court order Chandler and Miller to pay the monies received from the Tobacco Suit to the state's tobacco consumers. In that the settlement funds are not consumers' funds but rather state funds, both governmental officials have complied with their statutory duties and no writ of mandamus is necessary or proper in this matter.

For the foregoing reasons, the opinion and order of the Franklin Circuit Court entered September 17, 2002, sustaining the Appellees' motion to dismiss is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard M. Guarnieri
Frankfort, KY

BRIEF FOR APPELLEE:

D. Brent Irvin
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