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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000123-MR

SUSAN LAWRENCE; DAVID ALLOOD;
AND THE CENTER FOR ACCESSIBLE LIVING,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED — APPELLANTS

APPEAL FROM FRANKLIN CIRCUIT COURT
V. HONORABLE WILLIAM L. GRAHAM, JUDGE
CIVIL ACTION NO. 97-CI-001182

WILLIAM BUSHART (PREVIOUSLY ED LOGSDON),
IN HIS CAPACITY AS COMMISSIONER,
DEPARTMENT OF MOTOR VEHICLES,
TRANSPORTATION CABINET,
COMMONWEALTH OF KENTUCKY;
JONATHAN MILLER (PREVIOUSLY JOHN KENNEDY HAMILTON),
IN HIS CAPACITY AS STATE TREASURER,
COMMONWEALTH OF KENTUCKY;
ANN B. BROWN, IN HER CAPACITY AS
OLDHAM COUNTY COURT CLERK AND AS
REPRESENTATIVE OF THE CLASS OF
CLERKS OF 112 KENTUCKY COUNTIES
WITH POPULATIONS OF LESS THAN 70,000;
JACK SNODGRASS, IN HIS CAPACITY
AS CAMPBELL COUNTY CLERK;
J. MICHAEL LIBS, IN HIS CAPACITY
AS DAVIESS COUNTY COURT CLERK;
DONALD BLEVINS, IN HIS CAPACITY
AS FAYETTE COUNTY CLERK;
KENNETH TABB (PREVIOUSLY DAVID L. LOGSDON),
IN HIS CAPACITY AS HARDIN COUNTY CLERK;
BOBBIE HOLSCLAW (PREVIOUSLY REBECCA JACKSON),
IN HER CAPACITY AS JEFFERSON COUNTY CLERK;
BILL AYLOR, IN HIS CAPACITY
AS KENTON COUNTY CLERK;
LILLIAN PEARL ELLIOTT, IN HER

CAPACITY AS PIKE COUNTY CLERK;
AND DOT OWENS (PREVIOUSLY YVONNE GUY),
IN HER CAPACITY AS WARREN COUNTY CLERK APPELLEES

OPINION
AFFIRMING, IN PART,
AND REVERSING, IN PART,
AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: This case involves a challenge to the validity of KRS[1] 189.456, which requires Kentucky's county clerks to charge disabled persons an $8 fee[2] to obtain an accessible parking placard. Susan Lawrence, David Allgood, and the Center for Accessible Living filed suit against selected county clerks and various state officials, alleging that the fee was invalid because it limited disabled persons' access to public facilities. The circuit court granted summary judgment in favor of the appellees, holding that because Congress "failed to abrogate the sovereign immunity of the various states" under Title II of the federal Americans with Disabilities Act, the claims were barred by the Tenth and Eleventh Amendments. We

[1] Kentucky Revised Statutes.

[2] The term "fee" is used throughout this opinion to denote the monies charged by the county clerks upon issuance of the handicapped parking placards. But our use of the word "fee" does not signify our estimation as to whether the monies charged constitute a "fee" or a "surcharge" under 38 Code of Federal Regulations (CFR) 35.130(f). See discussion of this issue, *infra*, section (III)(B).

affirm the circuit court's reasoning, in part. But because we believe the court erred by denying appellant's request for relief from the county clerks, we reverse, in part, and remand.

I. FEES FOR HANDICAPPED ACCESSIBLE PARKING PLACARDS.

The facts of this case are not in dispute. By statute, Kentucky provides for the issuance of specially designated handicapped license plates[3] and removable handicapped accessible parking placards.[4] The license plates are available to qualifying individuals at the same price as other license plates, but the state charges an $8 fee for the removable parking placards.[5] The placards are valid for two years and may be renewed every two years thereafter for a total of six years.

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[3] KRS 186.042(2) states:

> On the application of any person with disabilities which limit or impair the ability to walk, who has lost the use of an arm or both arms, or who is blind, the Transportation Cabinet shall issue the person with a disability an accessible parking registration plate or renewal decal designating the vehicle licensed as being owned by or leased by a person with a disability.

[4] KRS 189.456(1) reads:

> On the application of any person who has a severe visual, audio, or physical impairment . . . the county clerk in the county of the person's residence shall issue the person with a disability an accessible parking placard. In addition, any agency or organization which transports persons with a disability as a part of the service provided by that agency or organization shall receive an accessible parking placard upon application to the county clerk for each vehicle used in the transportation of persons with a disability.

[5] KRS 189.456(2).

The $8 fee is only charged upon the initial application. After that renewals cost $4, and lost or stolen placards may be replaced for $2.[6] All 120 Kentucky county clerks are statutorily mandated to issue both the handicapped accessible license plates and the parking placards for a fee.[7]

II. THE SUIT IN FRANKLIN CIRCUIT COURT.

Susan Lawrence, who lives in Louisville, initiated this action in the Franklin Circuit Court. Although Lawrence is not herself disabled, her daughter, who died while this case was pending, was severely disabled. Lawrence was required to pay the placard fee for handicapped accessible parking when transporting her daughter.[8]

Shortly after Lawrence filed suit, David Allgood, who also lives in Louisville, joined as a plaintiff. Allgood is confined to a wheelchair as a result of an accident. He holds a parking placard for which he was required to pay the $8 fee.

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[6] KRS 189.456(6), (7). Although the state also charges a fee for the issuance of temporary handicapped parking placards, these fees are not at issue. Appellants only challenge the validity of the fees charged for the permanent placards.

[7] KRS 189.456.

[8] Lawrence originally filed a complaint in federal court for the Western District of Kentucky. Her case was dismissed for lack of subject matter jurisdiction. In a memorandum, entered on May 7, 1997, Judge Thomas B. Russell granted appellees' motion for summary judgment, holding the Tax Injunction Act barred Lawrence's suit. Lawrence v. Logsdon, et al., Civil Action No. 3:96-CV-521(R) (W.D. Ky. 1997).

Also added to the initial complaint was the Center for Assisted Living (CAL). CAL is a nonprofit disability resource center located in Louisville. As a part of its services, CAL offers transportation for disabled persons; as such, it was also required to pay the $8 fee to obtain an accessible parking placard.

The complaint alleged that the fee charged under KRS 189.456 for the issuance of the parking placard constituted a surcharge in violation of Title II of the Americans with Disabilities Act (ADA),[9] 28 C.F.R. 35.130(f), and the Kentucky Civil Rights Act.[10] It sought injunctive and declaratory relief, as well as monetary damages.

The case was filed against the following state and county officials: Ed Logsdon (now William Bushart), in his capacity as Commissioner of the Department of Motor Vehicles (DMV); John Kennedy Hamilton (now Jonathan Miller), in his capacity as Kentucky State Treasurer; Ann B. Brown, in her capacity as Oldham County Clerk and as representative of the class of clerks of 112 Kentucky counties with populations of

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[9] 42 U.S.C.A. § 12101, *et seq*. Pursuant to Title II, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C.A. § 12132.

[10] KRS 344.010, *et seq*.

less than 70,000; Jack Snodgrass, in his capacity as Campbell County Clerk; J. Michael Libs, in his capacity as Daviess County Clerk; Donald W. Blevins, in his capacity as Fayette County Clerk; David L. Logsdon (now Kenneth Tabb), in his capacity as Hardin County Clerk; Rebecca Jackson (now Bobbie Holsclaw), in her capacity as Jefferson County Clerk; Bill Aylor, in his capacity as Kenton County Clerk; Lillian Pearl Elliot, in her capacity as Pike County Clerk; and Yvonne Guy (now Dot Owens), in her capacity as Warren County Clerk.[11]

The Franklin Circuit Court granted summary judgment in favor of the appellees. The court ruled that the Tenth and Eleventh Amendments barred appellants' claims; and because of the doctrine of sovereign immunity, the court ruled that appellants were precluded from suing the state officials. The court also ruled that the DMV Commissioner and the State Treasurer were not proper parties and that appellants had failed to state a claim upon which relief could be granted under the Kentucky Civil Rights Act. This appeal follows.

[11] KRS 64.355 requires that fees collected by clerks in counties with a population greater than 70,000 are to be deposited with the state treasury, whereas fees collected by clerks in counties with populations under 70,000 are handled directly by the county. Therefore, because monetary relief was requested, the complaint distinguished between clerks from counties with populations greater than and less than 70,000.

III. PRELIMINARY ISSUE: IS IT ADA or DOT?

The parties disagree about whether the disputed parking placard fee implicates the protection afforded by the ADA, or whether these placards are actually mandated by the Department of Transportation's (DOT) Uniform System for Parking for Persons with Disabilities (USPPD).[12] Some of the county clerks assert that the provisions providing for the issuance of handicapped parking placards were "not created through Section 5 of the Fourteenth Amendment, but rather through Congress' spending power." In support of their argument, these clerks cite Public Law 100-641[13] and the language of the USPPD.

We agree that the USPPD gives the DOT authority to provide the states with guidelines for the issuance of the parking placards and that Public Law 100-641 permits the DOT to "encourage" states to adopt a placard program. But as the Court found in Duprey v. Connecticut Department of Motor Vehicles:

> While Public Law 100-641 and the USPPD as set forth in the DOT regulations address reserved disability parking, these provisions are *merely guidelines for states to accept or reject as they choose*. As one court stated, "Public Law 100-641 has no

[12] 23 C.F.R. 1235.

[13] Public Law 100-641, 23 U.S.C. S 402, "indicates that the Secretary of Transportation shall issue regulations which: (1) establish a uniform system for handicapped parking designed to enhance the safety of handicapped individuals and (2) encourage adoption of such a system by all the states." Dare v. California, 191 F.3d 1167, 1172 (9th Cir. 1999).

> enforcement mechanism and is not codified in the United States Code. It 'encourages adoption of such system by all the States,' [] but does not mandate compliance."[14]

In contrast, "the ADA is not a voluntary program that states may choose to adopt. The statute provides that qualified, disabled persons shall not be denied participation in or the benefits of public services, programs or activities because of their disability and shall not be discriminated against by a public entity."[15] While "the ADA does not render the USPPD meaningless," it does "prohibit[] the charging of a fee for access to the benefits of the program if the fee results in discriminatory treatment on the basis of disability."[16] Even if the USPPD and Public Law 100-641 authorize the DOT to allow states to charge an additional fee for the handicapped parking placards, the fees would violate the ADA's prohibition against surcharges. Therefore, we must reject the clerks' argument that the USPPD and Public Law 100-641 control this issue.

IV. ANALYSIS UPON APPEAL.

Lawrence, Allgood, and CAL make three main arguments: first, the State Treasurer and DMV Commissioner are proper

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[14] 28 F.Supp.2d 702, 711 (D.Conn. 1998) (emphasis added).

[15] McGarry v. Director, Dep't of Revenue of Missouri, 7 F.Supp.2d 1022, 1026 (W.D. Mo. 1998).

[16] *Id.* at 1027.

parties; second, the Eleventh Amendment does not "protect the county clerks from actions to remedy ongoing violations of Title II"; and, third, the Tenth Amendment does not protect the clerks "from liability for collecting fees in violation of Title II." These are legal issues which we review de novo.

A. THE PROPER PARTIES.

Appellants first contend that the circuit court erred by holding that the DMV Commissioner and State Treasurer were not proper parties to this action. Because Appellants have failed to establish how either of these parties is necessary to the disposition of this case, we must agree with the circuit court.

Appellants assert that the State Treasurer is a proper party because "[u]nder Section 106 of the Kentucky Constitution and KRS 64.355, all fees collected by county clerks in counties with a population of over 70,000 are deposited in the state treasury." Because the State Treasurer is the recipient "of placard fees collected in the most populous counties," Appellants claim he is an appropriate and necessary party.

With regard to the DMV Commissioner, Appellants argue that he is a necessary party because "Kentucky law provides that placards must contain 'information the Transportation Cabinet may by regulation require.'" They also claim the placards bear the words "KENTUCKY TRANSPORTATION CABINET Division of Motor

Vehicle Licensing" and that the Transportation Cabinet "is charged with authority to promulgate regulations to implement the placard program."

In its order granting summary judgment, the circuit court determined that neither the DMV Commissioner nor the State Treasurer "is a proper defendant in this action. They do not collect or administer these fees. These state Defendants (or their successors) have nothing to do with these disputed fees or the placards and have done nothing which would be subject to injunctive relief."

We agree with the circuit court. We do not believe appellants have sufficiently established that either the DMV Commissioner or the State Treasurer is a "necessary" and "proper" party. First, it is clear that the State Treasury is not implicated in the payment or retention of the placard fees. While it is true that KRS 64.350 requires clerks in counties with populations over 70,000 to remit the fees collected by their offices to the State Treasury, the Treasury serves merely as a repository. The remitted fees are returned completely to each county: 75 percent of the fees are used as funding for the county clerk's office; and the remainder goes to the county's "fiscal court[], urban-county government[], or consolidated

local government[]."[17] This fact is clarified by the language of KRS 64.355, which states:

> It is hereby declared to be the intent of the General Assembly that all fees of the office of county clerk . . . in counties having a population of seventy thousand (70,000) or more that are paid into the State Treasury pursuant to the provisions of Section 106 of the Constitution of Kentucky *are the property of the respective county* . . . .[18]

Moreover, KRS 64.152 makes it clear that clerks in counties with populations less than 75,000[19] are authorized to retain the entirety of the fees they generate. The fees are utilized as a means of operating each clerk's office, and any surplus amount is paid over to the county's fiscal court. The clerks are not required to remit any of the fees to the State Treasury.

Since the State Treasury is not implicated in the payment or retention of the handicapped parking placard fees, we agree with the circuit court that the State Treasurer's connection with this case is tenuous. So we affirm the circuit court's decision to dismiss the State Treasurer from these proceedings.

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[17] KRS 64.350.

[18] KRS 64.355(1) (emphasis added).

[19] We recognize the numerical discrepancy between KRS 64.355, which provides for clerks in counties with populations greater than 70,000, and KRS 64.152, which provides for clerks in counties with populations less than 75,000.

Second, there is no evidence in the record that the DMV Commissioner has any connection with the handicapped parking placards or the fees collected by the clerks. The mere fact that the parking placards originate in the Department of Transportation does not provide a sufficient correlation between the DMV Commissioner and the present controversy to necessitate his participation as a party. Therefore, we also affirm the circuit court's dismissal of the DMV Commissioner from this case.

B. STATE SOVEREIGN AND ELEVENTH AMENDMENT IMMUNITIES.

Appellants' second argument is that the circuit court erroneously held that the county clerks are protected from suit by both state sovereign immunity and the Eleventh Amendment. We agree with this argument, in part.

1. State Sovereign Immunity.

Sovereign immunity "is 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."[20] Under this doctrine, immunity extends not only to the state but, also, "to public officials sued in their representative (official) capacities, when the state is the real party against which relief in such cases is

[20] Yanero v. Davis, 65 S.W.3d 510, 517 (Ky. 2001).

sought."[21] The Kentucky Supreme Court has concluded that "Kentucky counties enjoy immunity under Kentucky law."[22]

Appellants argue that because "sovereign immunity has been waived for claims of disability discrimination under the Kentucky Civil Rights Act," the county clerks are not protected by state sovereign immunity in this action.[23] This argument is apparently based on the assumption that appellants' claims implicate the KCRA; but the circuit court found that "[n]o KCRA violation exists in this case." On appeal, appellants do not dispute this finding. Rather, they appear to argue that even though there is no KCRA violation, the waiver provision under the KCRA should nevertheless apply.

In discussing appellants' claims, the circuit court noted:

> Plaintiffs also argue that the statutory fees for issuing parking placards violate the Kentucky Civil Rights Act (KCRA). But clearly the KCRA does not repeal, either expressly or impliedly, KRS 189.456, the statute authorizing the placard fee. Nor

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[21] *Id.* at 518.

[22] Jefferson County Fiscal Court v. Peerce, 132 S.W.3d 824, 836 (Ky. 2004).

[23] KRS 344.450 reads: "Any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained, together with the costs of the law suit." In Department of Corrections v. Furr, 23 S.W.3d 615, 618 (Ky. 2000), the Kentucky Supreme Court interpreted KRS 344.450 to provide "a cause of action against the Commonwealth for violations of the Kentucky Civil Rights Act."

> did the Kentucky General Assembly waive sovereign immunity with respect to Title II of the ADA. The Generally Assembly did specifically adopt the employment and public accommodations provisions of Titles I and III of the ADA, but excluded any mention of the governmental public services provisions of Title II. If the Kentucky General Assembly intended to make the placard fees illegal under the KCRA, it could simply have repealed the statutory authorization of such fees. It did not do so. No KCRA violation exists in this case.

Upon review of the whole of the KCRA, we believe the circuit court is correct. As the court noted, the KCRA does not "specifically adopt" the governmental public services provisions of Title II. Unlike the ADA, the KCRA does not include a prohibition against "surcharges"; thus, appellants' claim that the $8 placard fee required under KRS 189.456 is an unlawful surcharge does not implicate the provisions of the KCRA. And because there is no KCRA violation, it is clear that the statute's waiver provision is inapplicable to appellants' claims.

Because counties are cloaked with state sovereign immunity, we believe the county clerks are afforded the same protection. But the alleged violation of the KCRA was appellants' only state law claim. And as the KCRA is not implicated in this action, appellants no longer have a claim for relief under state law. Therefore, whether the county clerks

are cloaked with state sovereign immunity is immaterial to the outcome of this case.[24]

2. Eleventh Amendment Immunity.

In contrast to the provisions of state sovereign immunity, the Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[25] In Alden v. Maine,[26] the United States Supreme Court noted that the term "Eleventh Amendment immunity," though often used by the courts, is "something of a misnomer."[27] The Court observed that:

> the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this

[24] In reaching this conclusion, we take note of the Kentucky Supreme Court's decision in Clevinger v. Board of Education of Pike County, 789 S.W.2d 5 (Ky. 1990). In Clevinger, the Court held that because the Commonwealth afforded a school board state sovereign immunity "from a suit for money damages for an injury wrongfully inflicted," the state sovereign immunity defense similarly protected the school board against a 42 U.S.C. §1983 claim. We perceive the holding in Clevinger to be limited only to §1983 claims; moreover, although it has not been expressly overruled, we question the viability of the holding in Clevinger following the U.S. Supreme Court's opinion in Howlett By and Through Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). Therefore, we decline to extend the holding in Clevinger to the present case.

[25] U.S. CONST., amend XI.

[26] 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d. 636 (1999).

[27] *Id.* at 713.

> Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

In Alden, the Supreme Court held that Eleventh Amendment immunity extended to provide protection to "nonconsenting States" who are sued in "private suits for damages in state courts."[28] The Court observed that the amendment "bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."[29]

Although counties enjoy protection from liability for state claims under the doctrine of sovereign immunity, the same does not hold true for claims brought under federal law. The U.S. Supreme Court has consistently held that a county is not an arm of the state; therefore, "[a] state's political subdivisions do not enjoy its Eleventh Amendment immunity from suit in federal court. Thus, there is no Eleventh Amendment immunity

[28] *Id.* at 712.

[29] *Id.* at 756.

for counties, cities, townships, municipalities, and similar municipal corporations or bodies politic."[30]

The rule denying Eleventh Amendment immunity to counties is well established. In 1890, the United States Supreme Court noted in Lincoln County v. Luning[31] that "'the [E]leventh [A]mendment, which restrains the jurisdiction granted by the constitution over suits against states, is of necessity limited to those suits in which the state is a party on the record.'"[32] Because a county is "a part of the state only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the state,"[33] the Court held that counties were not protected by Eleventh Amendment immunity.

Since Luning, the Supreme Court has applied this rule time and again to keep counties and other municipal entities from benefiting from Eleventh Amendment immunity.[34] Therefore,

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[30] 32A Am.Jur.2d. *Federal Courts* § 1124 (1995).

[31] 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766 (1890).

[32] *Id.* at 530.

[33] *Id.*

[34] *See* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 400-401, 99 S.Ct. 1171, 1177, 59 L.Ed.2d 401, 410 (1979); Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 43, 115 S.Ct. 394, 402, 130 L.Ed.2d 245, 257 (1994); Mt. Healthy City School District Board of Educ. v. Doyle, 429 U.S. 274, 280, 97 S.Ct. 568, 572-573, 50 L.Ed.2d 471, 479 (1977).

although Kentucky counties enjoy state sovereign immunity for claims brought under state law, they are not given the same protection for claims grounded in federal law.[35]

Appellants argue that because the Eleventh Amendment does not protect Kentucky counties from claims brought under federal law, the county clerks are not sheltered from this suit. In response, the county clerks contend that because KRS 189.456 requires them to collect the $8 fee upon issuance of the handicapped parking placards, they are performing non-discretionary, state-mandated duties; therefore, they argue they should be considered arms of the state for purposes of Eleventh Amendment immunity.

The decision of whether county clerks are protected by Eleventh Amendment immunity has yet to be decided by a reported decision in Kentucky. So we are compelled to analyze this issue to determine whether the Eleventh Amendment bars Appellants' claims against the county clerks.

When a state official is sued in his or her official capacity as an agent of the state, "[it] is deemed to be a suit against the state and is thus barred by the Eleventh Amendment . . . ."[36] But because counties do not enjoy Eleventh Amendment immunity, the same rule does not hold true for county

[35] *See* Peerce, *supra*, at 837.

[36] Scott v. O'Grady, 975 F.2d 366, 369 (1992).

officials; rather, a county official sued in his or her representative capacity as an agent of the county does not enjoy Eleventh Amendment immunity.[37] Thus, the question we must address is, when a county clerk enforces a state statute, is the clerk acting as an agent of the state or as an agent of the county?[38]

The office of county clerk is constitutionally mandated.[39] A review of the sundry duties of the clerks is unnecessary for the disposition of this case. It is enough to say that the clerks' duties include responsibilities mandated by both state and local laws to be performed for the benefit of either the state or the individual county in which the clerk serves. And because counties do not enjoy federal sovereign immunity, we believe it is clear that the Eleventh Amendment is not implicated when the clerks are implementing purely local duties for the benefit of the county.[40]

But when a county clerk is required to enforce a state law or order that benefits the state, it is conceivable that the

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[37] *Id.* at 371 ("[W]hen a county sheriff . . . performs his duties as the principal executive officer or chief law enforcement officer of the county, he acts as a county official and does not get the benefit of the Eleventh Amendment.")

[38] *Id.* at 369, 370.

[39] Ky. Const., § 99.

[40] Scott, *supra*, at 371.

clerk should be protected as an arm of the state. Several federal courts have extended Eleventh Amendment immunity to county officials deemed to be an arm of the state for immunity purposes. For example, in Scott v. O'Grady, the United States Court of Appeals for the Seventh Circuit held that county sheriffs who were required to execute a state court order were not acting as county officials; rather, because the sheriffs were fulfilling a non-discretionary, state-mandated, statutory duty on behalf of the state, they were acting as an arm of the state for Eleventh Amendment purposes.[41] Another example is Shipley v. First Federal Savings and Loan Ass'n, in which the Federal District Court for the District of Delaware held that a county sheriff performing his state-mandated duties with regard to a mortgage foreclosure was acting as an arm of the state.[42] And in Pusey v. City of Youngstown, the United States Court of Appeals for the Sixth Circuit held that a city prosecutor acted as a "state agent" when she prosecuted state criminal charges.[43]

The exception to the general rule denying Eleventh Amendment immunity to county officials is limited; it applies solely "for those cases in which the relief granted would run

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[41] *See* Scott, *supra*, at 371.

[42] 619 F.Supp. 421, 434-435 (D. Del. 1985).

[43] 11 F.3d 652, 657-658 (6th Cir. 1993).

directly against the state."[44] As the Supreme Court has recognized, the Eleventh Amendment only "bars a suit against state officials when 'the state is the real, substantial party in interest.'"[45] The state is considered to be the real party in interest only if "'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'"[46]

We believe the present situation is factually distinguishable from the situations presented in Scott, Shipley, and Pusey. While it is true that Kentucky's county clerks act under color of state law when they enforce KRS 189.456, the state is not affected by the clerks' performance of their duties. A judgment for money damages in this case would not "expend itself on the public treasury" or "interfere with the public administration," nor would it restrain the state from acting, or compel it to act. Rather, because the county clerks retain all of the fees collected from the handicapped parking placards and because only county clerks are required to issue the placards, a money judgment would only affect the

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[44] Crane v. State of Texas, 759 F.2d 412, 417 (5th Cir. 1985).

[45] Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984).

[46] *Id.* at n.11, *quoting* Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963).

administration and funding of the clerk's office and the county in which the clerk serves.

Although we agree that in certain circumstances, the Eleventh Amendment may protect county officials, we do not believe the clerks are cloaked with immunity in this case. So we must reverse that portion of the circuit court's opinion that concluded the clerks are sheltered from liability by the Eleventh Amendment.

C. TENTH AMENDMENT.

Appellants' third argument is that the circuit court erred in holding that the Tenth Amendment barred their claims. We agree.

Without fully discussing the implications of the Tenth Amendment, the circuit court simply ruled that "Plaintiffs' claims are barred against all defendants under sovereign immunity under the Tenth and Eleventh Amendments to the U.S. Constitution." The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[47]

The United States District Court for Connecticut recently discussed the issue of the interplay between the ADA

[47] U.S. CONST., amend. X.

and the Tenth Amendment in the case of Hicks v. Armstrong.[48] We agree with that court's reasoning and adopt its holding as follows:

> Generally, Congress may enact legislation pursuant to its enumerated powers. All other powers are reserved for the states. The result is a federalist system of dual sovereignty.
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> Two recent Supreme Court decisions have amplified the meaning of our system of dual sovereignty. In New York v. United States,[49] the Court held that Congress may not commandeer the states' legislative processes by directly compelling them to enact or administer a federal regulatory program. In Printz v. United States,[50] the Court held that the federal government may not compel states to implement, enact, enforce or administer, by legislation or executive action, a federal regulatory program. The State Defendants argue that the ADA violates the principles of federalism set forth in New York and Printz because it is one example of the federal government compelling the states to enact or administer a federal regulatory program.
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> . . . .
>
> However, the ADA violates neither of the prohibitions set forth in New York and Printz because Congress neither commandeers the states' legislative processes by directly compelling them to enact or administer a federal regulatory program, as prohibited by the Court in New York, nor compels states to implement, enact, or administer, by legislation or executive

[48] 116 F.Supp.2d 287 (D.Conn. 1999).

[49] 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d. 120 (1992).

[50] 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).

> action, a federal regulatory program, as prohibited by the Court in Printz.
>
> The ADA does not require states to pass anti-disability legislation. Moreover, the ADA does not press into federal service state officers and require them to enforce Congressional anti-disability discrimination statutes. The ADA simply requires that state officials abide by the ADA's requirements.

We agree with the federal court's reasoning and adopt it as our own. Therefore, we further hold that the circuit court erred in ruling that the Tenth Amendment barred appellants' claims.

V. ISSUES UPON REMAND.

We recognize that the remand of this case to the Franklin Circuit Court presents two new issues for the trial court. Specifically, our opinion raises possible venue questions that were not previously addressed by the court; furthermore, because the court dismissed this case based on the overarching immunity of the Eleventh Amendment, certain preliminary factual findings were not fully discussed.

First, with regard to venue: because our opinion affirms the dismissal of the state defendants, appellants now have potential claims solely against separate county clerks. The complaint individually names eight county clerks, all from counties with populations greater than 70,000. The clerks from counties with populations less than 70,000 were, apparently,

grouped together for convenience as a "class of clerks." But these clerks were never actually certified as a class.

KRS 452.405(2) states that actions "against a public officer for an act done by him in virtue or under color of his office" must be brought "in the county where the cause of action, or some part thereof, arose[.]" Appellants seek to be reimbursed from the county clerks for fees collected upon issuing handicapped parking placards, an act accomplished "under color" of the clerk's office. On remand, we believe the court must decide where the "cause of action" against the county clerks arose, and whether Franklin County is the appropriate venue for the claims made in this case.[51]

Finally, because we have decided that this case falls within the purview of the ADA, the court must decide the threshold question of whether the monies charged by the county clerks upon issuance of the handicapped parking placards constitute a "surcharge" or a permissible fee. Because the circuit court concluded that the complaint was barred by

[51] We note that under KRS 413.270(1), "[i]f an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety (90) days from the time of that judgment, commence a new action in the proper court." In Shircliff v. Elliott, 384 F.2d 947, 950-951 (6th Cir. 1967) the United States Court of Appeals for the Sixth Circuit held that because of the "universal interchanging" of the concepts of jurisdiction and venue, the term "no jurisdiction," as used in KRS 413.270, should be interpreted to comprehend "lack of venue."

Eleventh Amendment immunity, this specific issue was not addressed in the circuit court's judgment.

28 CFR 35.130(f), entitled "General prohibitions against discrimination," reads:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

In Dare v. California, the United States Court of Appeals for the Ninth Circuit held that the determination of whether a fee constitutes a surcharge under 28 CFR 35.130(f) requires a two part inquiry: "[f]irst, as a threshold matter," a reviewing court must consider "whether the measure for which [the state] levies the fee is 'required to provide that individual or group nondiscriminatory treatment' as mandated by the ADA";[52] and, second, the court must "evaluate whether the fee for the measure is a surcharge; in other words, [the court] consider[s] whether it constitutes a charge that nondisabled people would not incur."[53]

An inquiry into whether the monies charged by the county clerk constitutes a surcharge or a permissible fee must

[52] Dare, *supra*, 191 F.3d at 1171.

[53] *Id.*

be made by the circuit court. And that initial factual finding determines the further course of this controversy. If the monies are found to be a permissible fee, then the placard charge is perforce nondiscriminatory and inquiry ends there. But "[b]ecause surcharges against disabled people constitute facial discrimination,"[54] if the court finds that the monies constitute a surcharge as defined under 28 CFR 35.130(f), then this case may proceed in the proper venue in accordance with the preceding analysis.

VI. DISPOSITION.

In sum, we affirm the order of the Franklin Circuit Court, in part, to the extent that it has ruled:

1. Kentucky's DMV Commissioner and State Treasurer are not proper parties to this action; and

2. The KCRA is not applicable to appellants' claims and does not act as a waiver of sovereign immunity for claims brought under Title II.

And we reverse the court's order, in part, and remand the case for further proceedings in the circuit court consistent with this opinion because we conclude that:

1. The county clerks are not protected by Eleventh Amendment immunity; and

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[54] *Id.*

2. The Tenth Amendment does not bar appellants' claims.

ALL CONCUR.

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