IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

FILED
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CLERK & MASTER
DAVIDSON CO. CHANCERY CT.
D.C.M.

TENNESSEANS FOR SENSIBLE ELECTION LAWS,
Plaintiff,

vs.

No. 18-0821-III (1)

TENNESSEE BUREAU OF ETHICS and CAMPAIGN FINANCE, REGISTRY OF ELECTION FINANCE,
Defendants.

MEMORANDUM OPINION AND ORDER ON THE ISSUE OF SOVEREIGN IMMUNITY RAISED BY DEFENDANT

This was an action for declaratory and injunctive relief in which plaintiff challenged the constitutionality of certain election-related laws of the State of Tennessee. This Court's jurisdiction was invoked pursuant to Tenn. Code Ann. §1-3-121 & §29-14-102, as well as under 42 U.S.C. §1983. (Complaint at p. 20). The matter was disposed of in the trial court originally with a declaration that the challenged statutes were unconstitutional and an injunction against the defendant from enforcing the statutes in question. The ruling of the trial court was affirmed on appeal and the case was remanded to this Court in December 2019. One of the Code sections defendant was enjoined from enforcing was Tenn. Code Ann. §2-10-121.

A year after remand defendant began enforcing the statute. Plaintiff filed a Motion for Contempt based upon the defendant's renewed enforcement of Tenn. Code Ann. §2-10-121, as amended by the Legislature in 2019. Defendant filed a Motion for Relief from Judgment asserting that the injunction of this Court should not apply to the amended version of the statute. The Motion for Relief from Judgment was denied in an Order filed in December 2021.

The case is currently before the Court for disposition of the contempt issue. Defendants have filed a Motion for Summary Judgment on the issue of contempt and have raised

the issue of sovereign immunity as a bar to the contempt proceeding. Defendant's went further in oral argument and in their Reply in Support of Defendant's Motion for Summary Judgment filed February 15, 2022, (hereafter "Defendant's Reply"), by asserting that sovereign immunity bars this suit entirely, because it involves a constitutional challenge against a state agency rather than against a state official acting ultra vires. *See*, Defendant's Reply at p. 4.

A. Does the Doctrine of Sovereign Immunity Deprive this Court of Subject Matter Jurisdiction.

1. Court of Appeals Prior Ruling.

If sovereign immunity applies to this lawsuit then this Court lacked subject matter jurisdiction from the outset. *See,* Defendant's Reply at p. 4, fn. 2. The Tennessee Rules of Appellate Procedure require appellate courts to "consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review." Tenn. R. App. P. 13 (b). Because this consideration of subject matter jurisdiction is mandatory in the appellate courts it must be presumed that the Court of Appeals considered the issue of subject matter jurisdiction for this lawsuit and found that it existed. Thus, there is already an implicit finding of subject matter jurisdiction for this case by the Tennessee Court of Appeals. *Toms v. Toms*, 98 S.W.3d 140 (Tenn. 2003); *First American Trust Co., v. Franklin-Murray Development Co., L.P.*, 59 S.W.3d 135 (Tenn. App. 2001), *perm app. denied.*

2. Statutory Provisions Countenance Such Suits Against the State.

Tennessee's Declaratory Judgment Act provides that courts of record "have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Tenn. Code Ann. §29-14-102(a). The Act goes on to provide that "[a]ny person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined

any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." Tenn. Code Ann. §29-14-103. Who would an aggrieved person sue for a declaration that a statute is invalid if not the state.

In addition, the Uniform Administrative Procedures Act provides that the validity of a statute "may be determined in a suit for a declaratory judgment in the Chancery Court of Davidson County," and instructs that the "agency shall be made a party to the suit." Tenn. Code Ann. §4-5-225.

Finally, in Tenn. Code Ann. §1-3-121 the Legislature has provided that "a cause of action shall exist under this Chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action." This provision is found in the Chapter of Title One of the Code relating to the construction of statutes. The undersigned has difficulty imagining a scenario in which the State both authorizes suits for declaratory and injunctive relief against it, but the doctrine of sovereign immunity prevents a plaintiff from pursuing those claims.

3. *Colonial Pipeline*

Defendant asserts that suit is only permitted against a state official acting ultra vires and that sovereign immunity bars a constitutional challenge to a statute when the defendant named is a state agency. Defendant's reply at p. 4. Defendant relies upon the *Colonial Pipeline* case in this regard. *Colonial Pipeline Co., v. Morgan*, 263 S.W.3d 827 (Tenn. 2008). The *Colonial Pipeline* case does say that sovereign immunity will not bar "a declaratory judgment action challenging the constitutionality of a statute against state officers." *Id* at 853. *Colonial Pipeline* does not say that constitutional challenges to state statutes cannot be maintained against state agencies. One of the defendants in *Colonial* was the State Board of Equalization. The State

sought dismissal in the trial court in *Colonial* because plaintiff had failed to exhaust its administrative remedies and "because the Declaratory Judgment Act **does not authorize suits against state officials.**" (emphasis added) *id.* at 835. The issue raised in *Colonial* was whether the suit could proceed against the state officials. The suit against the state agency, the State Board of Equalization, does not appear to have been questioned.

The naming of an individual defendant in a suit for declaratory and injunctive relief involving an unconstitutional statute might simplify enforcement of an injunction, because of the availability of both incarceration and the imposition of fines in a contempt proceeding seeking to enforce a court's order. Apart from that potential advantage, the distinction between suing a state official and suing a state agency or department seems to the undersigned to be a distinction without a difference. The ultimate relief requested is a declaration that a particular statute is unconstitutional and the implementation of an injunction to prevent the State and its agents from enforcing the statute. The relief sought in such cases is the same whether the defendant is a state agency or state official, and does not involve any claim for money or property from the state. Tenn. Code Ann. §20-13-102.

There was no implication of the State's treasury or property in this case until the ill-advised decision was made to begin enforcement of the statute previously declared unconstitutional without first seeking relief from this Court's judgment. This is not an end run around sovereign immunity nor a "Trojan horse" attempt to reach the State treasury. *Colonial* at p. 851. Plaintiff seeks only to prevent the State from enforcing an unconstitutional statute.

4. Other Cases Against the State

There have been numerous cases challenging the constitutionality of various statutes brought directly against departments of state government. *Metro Government of Nashville and*

Davidson County v. Tennessee Department of Education, 2020 WL 5807636 (Tenn. App. 2020) involved a challenge to the constitutionality of the Tennessee Educational savings account program and the Chancellor's decision declaring that statute unconstitutional and enjoining the state defendants from implementing it was upheld on appeal. *McMahan v. Tennessee Department of Corrections,* 2007 WL 2198209 (Tenn. App. 2007), *perm app. denied,* involved a declaratory judgment action challenging the constitutionality of Tenn. Code. Ann. §40-28-123 relating to parole eligibility. *Helms v. Tennessee Department of Safety*, 987 S.W.2d 545 (Tenn. 1999), involved a challenge to the constitutionality of a property forfeiture statute. *Riggs v. Berson, etal*, 941 S.W.2d 44 (Tenn. 1997), was a declaratory judgment action against the Tennessee Department of Transportation challenging the constitutionality of a statute prohibiting use of land for a heliport near a national park. *Doochin v. Rackley*, et al, 610 S.W.2d 715 (Tenn. 1981), was a suit against the Tennessee Department of Conservation challenging the constitutionality of a statute precluding strip mining.

None of these cases involves a discussion of sovereign immunity. The undersigned presumes that the State's amenability to suits challenging the constitutionality of its statutes is so well known as to go unchallenged. In each of the referenced cases the appellate court involved had a mandatory obligation to consider the existence of subject matter jurisdiction. Tenn. R. App. P. 13 (b). Such a consideration must have involved some thought of the potential application of sovereign immunity since each case involved a suit against the state. Sovereign immunity "acts as a jurisdictional bar to an action against the state by precluding a court from exercising subject matter jurisdiction." *Colonial* at p. 851 (quoting from 81A Am. Jur.2d States §534 (2004)). Yet none of the learned Justices or Judges in the cases referenced above ever discussed the potential application of sovereign immunity.

The undersigned CONCLUDES that the doctrine of sovereign immunity did not bar this suit nor the granting of declaratory and injunctive relief against the State agency defendant.

B. Does the Doctrine of Sovereign Immunity Bar Imposition of Contempt Sanctions.

Having disposed of defendant's contention that sovereign immunity should have barred this proceeding from its outset, we shall next examine defendant's contention that "Plaintiff's requested relief is barred by the jurisdictional doctrine of sovereign immunity." Defendant's Motion for Summary Judgment at P. 1. Because sovereign immunity bars any attempt to recover monetary damages from the State without express legislative consent, defendant asserts that it cannot be required to respond to a contempt petition seeking monetary sanctions for willfully disobeying a court order.

1. Petition for Contempt is not a suit against the State.

First, a claim for contempt is not a separate cause of action. "Contempt proceedings are *sui generis* and are incidental to the case out of which they arise." *Baker v. State*, 417 S.W.3d 428, 435 (Tenn. 2013). In this regard, a contempt proceeding is not a separate suit against the State for damages. It is merely an enforcement tool to ensure the Court's ruling is followed. Having found that sovereign immunity did not bar this lawsuit, it logically follows that it does not bar the *sui generis* contempt proceeding.

2. Separation of Powers.

If sovereign immunity bars the courts from enforcing their judgments through the imposition of financial sanctions in cases involving the State, the separation of powers doctrine is rendered a nullity. The judiciary is reduced to a paper tiger with the authority to declare an action of the legislative or executive branch to be unconstitutional but an inability to enforce its

judgment. This simply cannot be. The judiciary is a co-equal branch of government in Tennessee. Tenn. Const. Art. II, Section 1; Article II, Section 2; *Tennessee Environmental Counsel v. Water Quality Control Board*, 250 S.W.3d 44 (Tenn. App. 2007). To allow the legislative and executive branches of the government to ignore the rulings of the judiciary regarding the constitutionality of state action would be a violation of the Tennessee Constitution. The end result would be the establishment of a dictatorship in the executive branch. The legislative branch could pass laws but the executive could implement and enforce them, or not, at its sole discretion, since the court would be unable to compel compliance with any judgment ruling on the constitutionality of a law or seeking to compel the executive branch to enforce a duly enacted and constitutional law.

This Court should not be "reduced to issuing injunctions against [the State] and hoping for compliance." *Hutto v. Finney*, 437 U. S. 678, 690 (1978). As the U. S. Supreme Court stated in *Hutto*, "many of the Court's most effective enforcement weapons involve financial penalties." *Id.* The "power of Courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration, whose judgments and decrees would be only advisory. If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery." *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 450 (1911).

3. Other Jurisdictions.

There are numerous cases in which a state or its subdivision has been held in contempt of court for violating a court's order and required to pay a fine. *See*, *Spallone v. U. S.*, 493 U. S.

265 (1990) (Approval of court imposed fines against *City*); *U.S. v. State of Tennessee*, 925 F. Supp. 1292 (W.D. Tenn. 1995) (State found in contempt and fines imposed); *Arkansas Department of Human Services v. State,* 850 S.W.2d 847 (Ark. 1993) (". . . a court must have the authority to control the parties and other persons before it. A state agent or agency having full knowledge of a court order and its import cannot disregard it and claim entitlement to sovereign immunity in response to a contempt citation." *Id.* at 488); *City of Gary v. Major*, 822 N.E. 2d 165 (Ind. 2005) (*City* found to be in contempt and award of damages for contemptuous conduct approved but damage award set aside for lack of evidence to support the amount); *McCain v. Dinkins*, 639 N. E.2d 1132 (NY Ct. App. 1994) (*City* found in contempt and ordered to pay fines. "Governmental Entities and their agents, should, like any other party, be held to compliance and sanctions for indifference, dereliction or defiance of judicial decrees." *Id* at 228); *Louisville Metro Dept. of Corrections v. King,* 258 S.W.3d 419 (KY Ct. App. 2007), review denied (2008), (*Department of Corrections* found in contempt and fined).

There are Tennessee cases in which the State has been held liable for contempt of court and monetary sanctions have been approved. *See*, *State exrel. Commissioner Department of Transportation v. Cox,* 840 S.W.2d 357, 366 (Tenn. App. 1991), *perm app. denied* (1992); *In re: Lillian M*, 2011 WL 334826 (Tenn. App. 2011). Defendant argues that the State implicitly waived its sovereign immunity in these cases by initiating the cases as plaintiff. The undersigned HOLDS that once the State is a proper party to a lawsuit, whether as plaintiff or defendant, it is subject to the contempt powers of the Court, and may be fined for contemptuous actions. The Court of Appeals approved the use of fines for contempt against the City of Memphis in *Flautt & Mann v. Council of City of Memphis*, 285 S.W.3d 856 (Tenn. App. 2008), *perm. app. denied.*

"Assessing a daily fine from the trial court's finding of contempt until the council's compliance would be a proper use of a coercive fine." *Id.* at 875.

C. CONCLUSION.

For the foregoing reasons, Defendant's Motion for Summary Judgment relating to the doctrine of sovereign immunity is hereby DENIED. A separate ruling regarding this Court's determination of whether defendant should be found in contempt of court will be issued hereafter.

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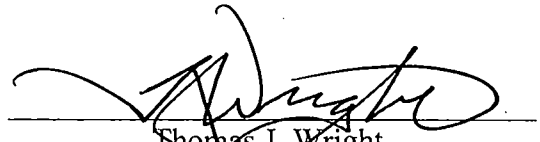

Thomas J. Wright
Senior Judge

CERTIFICATE OF SERVICE

I, hereby certify that a true and exact copy of the foregoing was mailed or personally delivered to

to the attorneys listed on Certificate of Service attached

via U. S. Mail, postage prepaid, this the 6 day of April, 2022.

Vicki Bailey
Clerk & Master

CERTIFICATE OF SERVICE

A true and exact copy of the foregoing Order has been served upon the following persons via email at the email addresses listed:

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On this the 15th day of April, 2022.

Schery Collins

Schery Collins, Judicial Assistant
to Senior Judge Thomas J. Wright