Koshiba v. Alonz, 7 ROP Intrm. 154 (1999)

JOSHUA KOSHIBA, individually and as class representative on behalf of all past and present contributors to the Republic of Palau Civil Service Pension Plan, Plaintiffs-Appellants,

v.

SYLVESTER ALONZ, KATHY KESOLEI, DAVE WILLIAMS, EMIL RAMARUI, MARINO BELLS, TEMMY SHMULL, DR. MASAO KUMANGAI, JONATHAN MAUI, individually and as Trustees of the Palau Civil Service Pension Plan; REPUBLIC OF PALAU, Defendants-Appellees,

and

REPUBLIC OF PALAU CIVIL SERVICE PENSION PLAN, Intervenor-Appellee.

CIVIL APPEAL NO. 36-97
Civil Action No. 237-94

Supreme Court, Appellate Division
Republic of Palau

Argued: November 16, 1998
Decided: February 12, 1999
Petition for rehearing denied: April 14, 1999

Counsel for Appellants: Jason Klein, Davis Wright Tremaine, LLP and Richard Brungard

Counsel for Appellee: Scott J. Campbell, Office of the Attorney General

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice.

MILLER, Justice:

In this civil appeal, we must decide whether the doctrine of sovereign immunity protects the Republic of Palau Civil Service Pension Plan ("Plan") from an award of attorneys' fees. The Trial Division held that it does. We disagree.

Senator Joshua Koshiba filed suit in July 1994 to force the Republic of Palau to make payments to the Plan to protect the retirement benefits of the Plan's members. This was a class action suit on behalf of a class of past and current Plan contributors against the Plan's trustees

and the Republic of Palau. Koshiba alleged that the Republic had failed to appropriate sufficient funds to make the Plan actuarially sound in violation of the statutory requirement that "[t]he Government of the Republic of Palau shall from time to time contribute additional sums to the fund in order to keep the fund on a sound actuarial basis." 33 PNC § 2030(3). After the suit was filed, the Republic contributed $3,730,000 to the Plan. After these contributions, the Plan's actuary and the actuary retained by Plaintiffs agreed that the Plan was on a sound actuarial basis and the case was settled.

Although the settlement agreement provided that Koshiba could apply for an award of attorneys' fees and costs, the parties did not stipulate whether Koshiba was entitled to any such award. When the application was made to the Trial Division, it was denied on the basis of sovereign immunity. This appeal followed.

⊥155 The attorneys for Koshiba seek attorneys' fees under the common fund doctrine, which authorizes attorneys' fees when the litigants preserve or create a common fund for the benefit of others as well as themselves. Under that doctrine, the award of fees is borne by the prevailing party, not the losing party. The theory behind the doctrine is that it would be unfair to allow a class to share in the benefits of an action, while forcing the litigating plaintiffs to shoulder all of the costs of the lawsuit:

> [A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole . . . . The [common fund] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.

Boeing Co. v. Van Gemert, 100 S.Ct. 745, 749 (1980) (citations omitted).

As stated above, after Koshiba filed his lawsuit, the Republic contributed over three million dollars to the Plan. This money constitutes the "common fund" from which his attorneys seek reimbursement. Any award of attorneys' fees would come from the Plan's funds. Therefore, the question presented by this appeal is whether the Plan, including the "common fund" from which the plaintiffs' attorneys seek fees, is protected by sovereign immunity.

It is by now beyond question that "the doctrine of sovereign immunity renders the ROP immune from lawsuits except to the extent that it has waived immunity by consenting to be sued." *Superluck Enterprises, Inc. v. Republic of Palau*, 6 ROP Intrm. 267, 271 (1997). [1] We begin our discussion with the obvious: the attorneys' fees that appellants wish to recover are sought not from the Republic of Palau, but from the Plan. This raises, but does not answer, the question before us. The Plan presents three reasons why the sovereign immunity doctrine should nevertheless be applied here: because the Plan is a government agency, because the funds in the Plan retain their governmental character, and because, whatever the nature of the Plan itself the

[1] Appellants argued to the trial court and here both that the Plan is not protected by sovereign immunity, and that, even if it were, its immunity has been waived. Because we find the first argument persuasive, we do not reach the second.

Republic has a continuing obligation to provide funds to it which may be affected by a payment of fees now. We address these contentions in turn.

Citing the analysis employed by this Court in *College of Micronesia v. Udui*, 1 ROP Intrm. 397 (1987), the Trial Division concluded that because the Plan was a government agency, it was protected by sovereign immunity. While we have no occasion to quarrel with the Trial Court's premise, we do not believe that its conclusion necessarily follows. The *College of Micronesia* case involved a rather specific question of statutory interpretation - whether the College was required to comply with the Protection of Resident Workers Act, 30 PNC §§ 101 *et seq.*, which exempts from its application "any branch or agency of the ⊥156 national government." *Id.*, § 103(c). The Court answered this question - and only this question - in the affirmative: "This Court concludes that the College of Micronesia for the purpose of the Protection of Resident Workers Act, 30 PNC, is a government agency." 1 ROP Intrm. at 400.

The Court in *College of Micronesia* was not faced with a claim of sovereign immunity, and did not purport to be resolving the question of whether and when a suit against a governmental entity other than the Republic itself should be barred. That question we believe is a quite different one. Instructive in this regard are cases interpreting the constitutional grant of sovereign immunity to states provided by the Eleventh Amendment to the United States Constitution. Those cases make clear that while certain actions against state agencies should be treated as actions against the state and therefore barred, there are other actions - although also against state agencies performing governmental functions - that may go forward. *E.g., Sherman v. Curators of the University of Missouri*, 16 F.3d 860, 862 (8th Cir. 1994)("While the eleventh amendment bars private parties from suing a state in federal court, state-connected entities or subdivisions do not always share in their state's immunity"). The question those cases ask is not simply whether an agency can be characterized as governmental, but whether it "should be regarded as the sovereign's alter ego for eleventh amendment purposes," *Blake v. Kline*, 612 F.2d 718, 722 (3d Cir. 1979), or, as one court has put it, whether it "is 'an arm of the state enjoying eleventh amendment immunity or whether it possesses an identity sufficiently distinct from that of the [state] to place it beyond that shield.'" *Pendergrass v. Greater New Orleans Expressway Comm'n*, 144 F.3d 342, 344 (5th Cir. 1998), *quoting Minton v. St. Bernard Parish Sch. Bd.*, 803 F.2d 129, 131 (5th Cir. 1986).

Although courts have formulated various multifactored tests to employ in making this determination, the cases have focused principally on two factors: "the degree of autonomy of the governmental entity and whether recovery against it would come from state funds." C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 3524 at pp. 135-36 (1984 ed.). Most recently, the U.S. Supreme Court has emphasized the latter factor, noting that the "vast majority of Circuits . . . have concluded that the state treasury factor is the most important factor to be considered . . . and, in practice, have generally accorded this factor dispositive weight." *Hess v. Port Authority Trans-Hudson Corp.*, 115 S.Ct. 394, 405 (1994).

Whether we consider both factors or solely the financial impact of the judgment, we believe that the Plan should not be considered the alter ego of the Republic and accordingly should not be considered the "sovereign" in applying the doctrine of sovereign immunity. As a

matter of autonomy, we note that although the trustees of the Plan are appointed by the President with the advice and consent of the Senate, 33 PNC §2010(b), their terms of appointment are fixed and staggered, *id.* § 2010(c), presumably to ensure their independence from any particular administration. The Board of Trustees has the power to sue and be sued in its own name, *id.* § 2010(d)(11), including the power to "seek injunctive and other equitable relief" against other public agencies that have failed to make required contributions to the Plan. *Id.* § 2030(b)(4). Finally, we note that the assets of the Plan (the Trust Fund), which the Board, through its appointed administrative agent, *see* ⊥157 *id.* § 2012(a), has the "full power" to manage and invest, *id.* § 2022(a), are statutorily required to be held "separate and apart from any other funds or accounts of the National Government of the Republic of Palau." *Id.* § 2020.

The second factor, which, as noted above, has been characterized as the "most important," also points in the same direction: any judgment that may be entered awarding attorneys' fees will be paid solely out of the assets of the Trust Fund, and will not be collectible from the National Treasury. If, as we believe, the purpose and scope of the sovereign immunity doctrine is to bar suits (absent waiver) that "require action by the sovereign or disturb the sovereign's property," *Larson v. Domestic & Foreign Commerce Corp*, 69 S.Ct. at 1457, 1460 (1949) (emphasis added), then we do not find it implicated by the instant request for attorneys' fees. *See also id.* ("The issue is whether this particular suit is not also, in effect, a suit against the sovereign.")

Relying on a line of cases exemplified by *National Ass'n of Farmworker Organizations v. Marshall*, 628 F.2d 23 (D.C. Cir. 1979), the Plan argues that the funds out of which appellants seek to recover their fees, which were paid to it out of the National Treasury, retain their governmental - and presumably sovereign - character, notwithstanding that they are now assets of the Trust Fund. We disagree. First, it is surely an overstatement to suggest that all government appropriations retain their governmental character. *National Treasury Employees Union v. Nixon*, 521 F.2d 317 (D.C. Cir. 1975), which is discussed and distinguished in *Marshall* makes clear, for example, that there is no sovereign immunity bar to assessing attorneys' fees out of court-ordered salary payments to federal employees. Second, we believe that the payments made to the Plan are distinguishable from the moneys at issue in *Marshall* and like cases. Without reciting all of the facts underlying that case, we believe it sufficient to note - as the court there did - that although the funds at issue had been distributed by the Secretary of Labor to various grantees, "the Secretary ha[d] continuing control over the funds, even while they [were] in the grantee's hands, and [could] audit the grantee's accounts or recall the funds." *Marshall*, 628 F.2d at 26. Here, by contrast, although the Public Auditor is directed to "maintain an oversight function on all assets of the Fund," 33 PNC § 2025(a), there is no sense in which it can be said that he or any other representative of the National Government has control over the assets, and there is no mechanism by which those assets can be recalled or otherwise revert to the National Treasury. They are, as discussed above, legally separate from the all other government funds and cannot even be borrowed by the National Government, *id.* § 2023, much less be recalled by it.

The Plan also argues that because of the Republic's continuing obligation to "keep the Fund on a sound actuarial basis," a judgment against the Plan's assets is tantamount to a

judgment against the Republic itself. Again, we disagree. Contrary to the Plan's assumptions, there is not necessarily a one-to-one correspondence between payments made out of the Fund and payments to the Fund by the Republic. It is not inevitable that any diminution in the Plan's assets will render the Fund actuarially unsound thereby requiring additional contributions. Whether the Republic will at some later date be required to make additional contributions to the Fund ⊥158 depends rather on a number of contingencies, including, for example, the success of the Fund's investments. We do not believe that the mere possibility that such a payment may someday be necessary is sufficient to call into play the doctrine of sovereign immunity where, as we have found above, it is otherwise inapplicable. *Accord, Boatmen's First Nat'l Bank v. Kansas Public Employees Retirement System* , 915 F. Supp. 131, 138 (W.D. Mo. 1996) ("The mere possibility of (the State of Kansas] having to pay for a judgment is simply not good enough").[2]

Having concluded that sovereign immunity does not bar the attorneys' fees sought herein, we note that, at this stage of the proceedings, appellants' contentions that such fees should be awarded remains unresolved. In addition to putting forward the defense of sovereign immunity, the Plan argued before the trial court that even if that doctrine did not apply, the law firm that had filed a fee application would be entitled to no recovery or only to a much smaller fee than it demanded because, among other reasons, it had entered the litigation at a very late stage after most of the additional funding had already been provided. Those arguments, which were pretermitted by the trial court's conclusion on sovereign immunity, should now be addressed on remand.

For all of the reasons stated above, the order of the trial court denying the application for attorneys' fees is hereby vacated and the case is remanded for further proceedings consistent with this opinion.

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[2] *Almond v. Boyles*, 612 F. Supp. 223 (E.D.N.C. 1985), a case denying an eleventh amendment sovereign immunity defense to the North Carolina Teachers' and State Employees, Retirement System is instructive on both of the arguments made by the Plan. There, as here, the court noted that "state funds appropriated to the Retirement System lose their identity as 'general revenue funds,'" and held that "the law is clear that the isolation of Retirement System funds from the state's general revenues weighs heavily against the Retirement System's eleventh amendment argument." 612 F. Supp. at 228. There also, the court found that defendants had not shown "that the relief requested would inevitably lead to an additional appropriation of state funds." *Id.* The court contrasted the situation in *Fitzpatrick v. Bitzer*, 519 F.2d 559, 565 (2d Cir. 1975), rev'd on other grounds, 96 S.Ct. 2666 (1976), in which, given the statutory scheme in place, it was found that "[a] judgment against the fund would . . . automatically increase the obligations of the general state treasury and amount to a judgment against the state."