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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

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Kelly Butler, in his official capacity as Alabama Director of Finance, and Chris Roberts, in his official capacity as Director of the Alabama Office of Indigent Defense Services

v.

Will J. Parks III and Claire Porter

Appeal from Montgomery Circuit Court
(CV-18-901008)

MITCHELL, Justice.

Two attorneys filed a complaint to recover fees they billed in the course of representing indigent defendants in criminal cases and sought to certify several classes of plaintiffs. Specifically, they asserted that State officials improperly refused to pay bills for fees that exceeded statutory payment caps. The trial court entered a class-certification order, and the State officials appealed. Because State immunity bars the attorneys' request for retrospective monetary relief, and because the attorneys lack standing to bring a constitutional challenge on behalf of indigent defendants, we reverse and remand.

Facts and Procedural History

Alabama law provides for the appointment of attorneys for indigent defendants in criminal cases. It also provides a process to compensate those attorneys, but it caps the amount they can be paid based on the class of the defendant's criminal charge. Attorneys could previously recover legal fees in excess of the caps if the court found "good cause." See Act No. 1999-427, § 1, pp. 766-68, Ala. Acts 1999 (codified as amended at § 15-12-21, Ala. Code 1975). But that changed in 2011 when the Legislature amended § 15-12-21. See Act No. 2011-678, Ala. Acts 2011.

Among other changes, Act No. 2011-678 omitted the good-cause exception to the payment caps and created the Office of Indigent Defense Services ("OIDS").

Section 15-12-21(d) sets forth the process by which appointed attorneys can be paid their fees:

> "[A]ppointed counsel shall be entitled to receive for their services a fee to be approved by the trial court. The amount of the fee shall be based on the number of hours spent by the attorney in working on the case. The amount of the fee shall be based on the number of hours spent by the attorney in working on the case and shall be computed at the rate of seventy dollars ($70) per hour for time reasonably expended on the case. The total fees paid to any one attorney in any one case, from the time of appointment through the trial of the case, including motions for new trial, shall not exceed [$1,500 to $4,000, depending on the criminal charge, excluding cases involving a capital-offense charge or a charge carrying a possible sentence of life imprisonment without the possibility of parole]."

Section 15-12-21(e) expands on that process and on the role OIDS plays. It instructs counsel to "submit a bill for services rendered" to OIDS and states that the bill "shall be accompanied by a certification by the trial court that counsel provided representation to the indigent defendant, that the matter has been concluded, and that to the best of his or her

knowledge the bill is reasonable based on the defense provided." § 15-12-21(e). The trial court, however, "need not approve the items included on the bill or the amount of the bill, but may provide any information requested by" OIDS. Id. After the bill is submitted to OIDS for "review and approval," OIDS recommends "to the [State] Comptroller that the bill be paid." Id. OIDS may also "forward the bill to the indigent defense advisory board for review and comment prior to approval." Id. Attorneys who dispute the amount they are entitled to can pursue the resolution process set forth in Ala. Admin. Code (Dep't of Fin.), r. 355-9-1-.05.

Operating within this statutory framework, attorneys Will J. Parks III and Claire Porter ("the Attorneys") accepted an appointment in 2016 to represent an indigent defendant who had been charged with murder. After the defendant pleaded guilty to manslaughter, the State of Alabama paid the Attorneys $4,000 each for the legal services they had provided to the defendant -- which is the maximum amount § 15-12-21(d) allows for that defendant's crime. Parks then submitted a bill to the court for $17,731, and Porter submitted a bill for $6,398. The trial court certified

both fee submissions as reasonable to the best of its knowledge, but it noted that its certification was "not an approval of the amount[s] submitted by" the Attorneys. OIDS refused to pay either of the additional fee submissions. The Attorneys did not pursue the administrative remedy set forth in r. 355-9-1-.05 regarding the rejection of their additional fee submissions.[1]

The Attorneys then sued, in their official capacities, Kelly Butler, the Alabama Director of Finance, and Chris Roberts, the Director of OIDS ("the Officials") in the Montgomery Circuit Court. The Attorneys sought a judgment declaring that the omission of the good-cause exception in the 2011 amendment to § 15-12-21 was a drafting error, which they say can be "cured" by reading that exception back into the statute, and that trial judges have inherent authority to order payment of fees to satisfy constitutional requirements. Alternatively, they asserted that the lack of a good-cause exception in § 15-12-21 violates the federal and state

[1]The Attorneys alleged in their complaint that r. 355-9-1-.05 is invalid.

constitutions by, among other things, depriving indigent defendants of their rights to a fair trial and effective assistance of counsel.

The Attorneys also asserted class claims and sought to certify three classes of plaintiffs: (1) attorneys who submitted bills that OIDS refused to pay because the bills exceeded the payment caps; (2) attorneys who reduced their bills due to the payment caps; and (3) attorneys whose pending or future bills might be denied because they exceed the payment caps. The trial court certified the first and third classes. In doing so, it held that State immunity did not bar attorneys in the first class from seeking retrospective monetary relief.

The Officials have appealed the trial court's class-certification order, arguing that State immunity bars the claims asserted on behalf of the first class and that the Attorneys lack third-party standing to raise certain constitutional challenges on behalf of indigent defendants.

Standard of Review

Because this appeal raises issues of subject-matter jurisdiction, our review is de novo. See Barnhart v. Ingalls, 275 So. 3d 1112, 1121 (Ala. 2018).

Analysis

The Officials raise two issues on appeal. First, they argue that State immunity bars the Attorneys from obtaining monetary relief for fees in excess of the payment caps that OIDS has refused to pay in past cases. Thus, they say, the trial court lacked subject-matter jurisdiction and erred by certifying the first class. Second, the Officials argue that the Attorneys lack third-party standing to assert indigent defendants' rights to a fair trial and effective assistance of counsel and, therefore, cannot make those arguments with respect to either class that the trial court certified. We agree with the Officials on both points and thus reverse and remand.

A. State Immunity Bars Retrospective Monetary Relief

The Alabama Constitution provides that "the State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. 1901 (Off. Recomp.), Art. I, § 14. That doctrine, known as State immunity, not only renders the State and its agencies immune from suit, but also renders "State officers and employees, in their official capacities and individually," immune from suit "when the action against them is, in effect, one against the State." Barnhart, 275 So. 3d at 1122; see also

Patterson v. Gladwin Corp., 835 So. 2d 137, 142 (Ala. 2002) (" 'In determining whether an action against a state officer is barred by § 14, the Court considers the nature of the suit or the relief demanded, not the character of the office of the person against whom the suit is brought.' " (citation omitted)). "The wall of immunity erected by § 14 is nearly impregnable." Id. And State immunity is not just a defense -- when it applies, it "divests the trial courts of this State of subject-matter jurisdiction." Alabama State Univ. v. Danley, 212 So. 3d 112, 127 (Ala. 2016).

This Court has, however, recognized several categories of lawsuits against the State, its agencies, or its officials or employees that do not constitute suits against the State. The Officials address two of those categories, often referred to as "exceptions" to State immunity, as potentially relevant. But they argue that those two categories -- actions brought to compel State officials to perform their legal duties and actions to compel State officials to perform ministerial acts -- are ultimately inapplicable here. See id. at 123 (summarizing the six "exceptions" to State immunity). We agree with the Officials.

The trial court's order granting the Attorneys' motion for class certification did not directly address whether the exceptions to State immunity would apply to claims challenging § 15-12-21. Instead, it relied on several cases in which this Court permitted claims for retrospective monetary relief against public actors. Of those cases that addressed State immunity at all, there were allegations that the State officials or employees had misinterpreted or misapplied governing legal authority. See, e.g., Barnhart, 275 So. 3d at 1124-25 (holding that State immunity did not bar suit against State commission that had allegedly incorrectly interpreted statute that would, if plaintiffs were correct, impose a ministerial duty).

But that is not what the Attorneys alleged here. In fact, they conceded below that the Officials applied § 15-12-21 as written. See R. 49 (agreeing "[a]bsolutely" with the trial court's assertion that § 15-12-21 "does not give [the Officials] a ministerial duty to do what you're asking"); R. 62 (stating that, "unless there is a ruling that the law itself is wrong, I agree, [the Officials'] ministerial duty is to pay what the statute says"). Rather, among other requested relief, the Attorneys sought a judgment

declaring: (1) that the omission of the good-cause exception was a drafting error curable by supplying the exception included in the previous version of § 15-12-21; (2) that, alternatively, if the Legislature intended to omit the good-cause exception, the current version of § 15-12-21 omitting that exception is unconstitutional; and (3) that § 15-12-21 does not prohibit trial courts from exercising judicial power, independent of any legislative act, to disregard the payment caps and order payment of reasonable fees necessary to secure a fair trial and effective assistance of counsel. As we explain below, State immunity bars the Attorneys from recovering retrospective monetary relief based on those arguments.

1. The "Drafting Error" Argument

The Attorneys contend that the omission of the good-cause language in § 15-12-21 was a drafting error. If so, their argument should be directed to the Legislature -- not the Officials or the courts. In fact, the Attorneys agreed with the trial court's characterization of their argument as being one that "somehow the legislature goofed, because it didn't include a good cause phrase in the statute." And the "cure" the Attorneys seek -- resupplying the good-cause language from the previous version of

§ 15-12-21 -- is not a correct interpretation and application of §15-12-21 but, rather, a judicial rewriting of the statute to say what the Attorneys think it should say. See R. 15 (agreeing with the trial court that the Officials "did what the legislature told them to do," but arguing that "if the law is what it ought to be," the Officials "will pay everybody as they should have been paid"); R. 62 ("Nobody's saying that the people over at OIDS did anything bad. We're just saying, if their law had been what it should be, they would have paid the additional."). The Attorneys' requested relief -- writing words into a statute that are not there -- is the province of the Legislature and not within the judicial power. See Ala. Const. 1901 (Off. Recomp.), Art. III, § 42 ("[T]he judicial branch may not exercise the legislative or executive power.").

The Attorneys do not forcefully argue otherwise on appeal. In a short footnote in their brief, they assert that a phrase in § 15-12-21(d) -- "appointed counsel shall be entitled to receive for their services a fee to be approved by the trial court" -- imposes a ministerial duty upon OIDS to pay what the trial court approves. See Attorneys' brief at 29 n.10. But it does not appear that the Attorneys made this argument in the briefing or

oral argument below -- in fact, it would conflict with the positions they took below. See, e.g., R. 49 (agreeing "[a]bsolutely" with the trial court's assertion that § 15-12-21 "does not give [the Officials] a ministerial duty to do what you're asking"). Thus, we need not address any further whether § 15-12-21 imposes a ministerial duty upon the Officials or OIDS. And because no other exception to State immunity applies, State immunity bars this claim for retrospective monetary relief.

2. Holding § 15-12-21 Unconstitutional or Inapplicable Would Not Retroactively Impose a Ministerial Duty on the Officials

The Attorneys advanced one theory in their complaint that they say would subject the Officials to performing ministerial duties. According to the Attorneys, if the fee caps § 15-12-21 are unconstitutional because the statute lacks a good-cause exception, the Officials "have a legal and ministerial duty to pay Plaintiffs' fees in the amounts certified as reasonable by the trial court ...." The trial court's order echoed the Attorneys' argument, stating that the "logical fallacy of the [Officials'] argument is that State officers acting under an invalid statute who

withheld funds from someone" could "never be compelled to repay or refund that money," which is "not the law."

This argument does not hold up. The cases on which the Attorneys rely, including Barnhart, are distinguishable because they did not involve claims that the statute at issue was unconstitutional or otherwise invalid. And it does not follow that if § 15-12-21 or some part of it is held unconstitutional -- or if it is determined that trial judges have inherent authority to disregard the payment caps in § 15-12-21 -- that a retroactive ministerial duty suddenly springs to life and requires OIDS to pay exactly what a trial judge certifies as reasonable "to the best of [his or her] knowledge" under § 15-12-21(e). See Patterson, 835 So. 2d at 142-43, 154 (holding that State immunity barred class action for recovery of taxes paid in accordance with a statute later determined to be unconstitutional).

The Attorneys' claims on behalf of the first class are effectively claims against the State. Thus, State immunity bars the Attorneys' claims for retrospective monetary relief, and the trial court lacked subject-matter jurisdiction to certify the first class. See id. at 154.

B. The Attorneys Lack Third-Party Standing to Assert Constitutional Rights of Unidentified Indigent Defendants

The Officials argue that the Attorneys lack standing to challenge the constitutionality of § 15-12-21 on the alleged basis that it violates indigent defendants' federal and state constitutional rights to a fair trial and effective assistance of counsel. The Officials base this argument on the United States Supreme Court's decision in Kowalski v. Tesmer, 543 U.S. 125 (2004).[2] In Kowalski, two attorneys challenged a Michigan statute that prohibited the appointment of attorneys for indigent defendants who appeal their not-guilty or no-contest pleas. Id. at 127-28. The attorneys argued that the statute violated defendants' federal constitutional rights to due process and equal protection. Id. at 128. Additionally, the attorneys argued that they had suffered an injury because "the Michigan

[2] We reject the Attorneys' argument that the Officials waived their third-party-standing argument. See State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1028 (Ala. 1999) ("When a party without standing purports to commence an action, the trial court acquires no subject-matter jurisdiction."); Ex parte Smith, 438 So. 2d 766, 768 (Ala. 1983) ("Lack of subject matter jurisdiction may not be waived by the parties and it is the duty of an appellate court to consider lack of subject matter jurisdiction ….").

system 'has reduced the number of cases in which they could be appointed and paid as assigned appellate counsel.' " Id. at 129 n.2.

In addressing those arguments, the Supreme Court recognized, as a general rule, that "a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' " Id. at 129 (citation omitted). That rule assumes that "the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation." Id. Otherwise, "the courts might be 'called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.' " Id. (citation omitted).

But the Supreme Court also noted that there is an exception to the rule when it is necessary to grant a third party standing to assert the rights of another. That exception requires two showings from the party asserting standing: (1) that "the party asserting the right has a 'close' relationship with the person who possesses the right" and (2) that "there

is a 'hindrance' to the possessor's ability to protect his own interests." Id. at 130 (citation omitted). As to the first showing, the Supreme Court reasoned not only that the relationship between the attorneys and hypothetical indigent defendants was not close, but that it did not exist "at all," id. at 131, because it consisted of a "future attorney-client relationship with as yet unascertained Michigan criminal defendants," id. at 130. And as to the second showing, there was no dispute "that an indigent denied appellate counsel has open avenues to argue that denial deprives him of his constitutional rights." Id. at 131. Thus, the Supreme Court held that the attorneys lacked third-party standing.

Notably, the Attorneys do not attempt to distinguish Kowalski. Rather, they cite Barnhart and Wyeth, Inc. v. Blue Cross & Blue Shield of Alabama, 42 So. 3d 1216 (Ala. 2010), arguing that they "have a personal, concrete, adversarial stake in all of the claims they have asserted, because their success (or not) depends on the declaratory and retrospective relief they seek." Attorneys' brief at 40. But neither Barnhart nor Wyeth addressed third-party standing. In both of those class actions, this Court evaluated whether the named plaintiffs had the

requisite personal interest in the outcome of the claims to establish their adequacy as class representatives. That is not at issue here. Instead, the question is whether the Attorneys are in a position to take up the constitutional rights of third parties who are not within the scope of this class action. Barnhart and Wyeth, therefore, have no bearing on the issue of third-party standing.

We turn now to whether Kowalski applies. The standing analysis in that case does not bind this Court because the Supreme Court's standing inquiry "asks whether a litigant is entitled to have a federal court resolve his grievance." Id. at 128 (emphasis added). Nevertheless, the general third-party-standing rule articulated in Kowalski is consistent with principles of standing that Alabama courts have applied to constitutional claims. See, e.g., J.L.N. v. State, 894 So. 2d 751, 755 (Ala. 2004) ("Although there may be parties whose constitutional rights may be harmed by § 15-20-26(b), Ala.Code 1975, [the plaintiff] has failed to demonstrate that he is such a party. Therefore, he lacks standing to challenge the constitutionality of that statute."); Bland v. State, 395 So. 2d 164, 166 (Ala. Crim. App. 1981) ("[A]s a general rule, if there is no

constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations."). The parties have identified no Alabama case governing this third-party-standing inquiry, and we view the Kowalski framework as helpful in analyzing the third-party-standing issue raised here.

Applying Kowalski, we agree with the Officials that the Attorneys lack third-party standing to make constitutional challenges on behalf of unidentified indigent defendants. First, as in Kowalski, the Attorneys have not specifically identified whose rights have been violated -- rather, their complaint refers to indigent defendants generally. That is not sufficient to establish a close relationship with any individual whose rights have allegedly been violated. The fact that the Attorneys claim a personal interest in the outcome of the constitutional challenge is not enough. See Kowalski, U.S. 543 at 129 n.2. Because the Attorneys have not identified any instance in which an indigent defendant has made the constitutional argument that the Attorneys advance here, we risk deciding an abstract issue in which " 'judicial intervention may be unnecessary to

protect individual rights.' " Id. at 129 (citation omitted). And we are mindful of the Supreme Court's concerns that recognition of standing in a situation like this could open a Pandora's box. See id. at 134 n.5 ("A medical malpractice attorney could assert an abstract, generalized challenge to tort reform statutes by asserting the rights of some hypothetical malpractice victim (or victims) who might sue. An attorney specializing in Social Security cases could challenge implementation of a new regulation by asserting the rights of some hypothetical claimant (or claimants). And so on." (citations omitted)).

Even if the Attorneys were able to make the first showing in Kowalski, they cannot make the second. The Attorneys have not attempted to identify any "hindrance" preventing indigent defendants from bringing their own claims; nor is any apparent to us. They have, however, highlighted statutes governing indigent-defendant appeals and postconviction advocacy. See §§ 15-12-22 and 15-22-23, Ala. Code 1975. Those statutes have a good-cause exception similar to what the Attorneys seek in this lawsuit. See id. Thus, the Attorneys have not shown a

hindrance to indigent defendants' seeking an appellate or postconviction remedy.

For these reasons, we hold that the Attorneys do not have third-party standing to argue that unidentified indigent defendants' rights to a fair trial and effective assistance of counsel have been violated.

Conclusion

Because State immunity bars the Attorneys from recovering retrospective monetary relief, the trial court lacked subject-matter jurisdiction to certify the first class. Additionally, the Attorneys lack third-party standing to claim that indigent defendants, as a general group, have been or will be deprived of their constitutional rights to a fair trial and effective assistance of counsel. We therefore reverse the portion of the trial court's order certifying the class seeking retrospective monetary relief and remand the case for further proceedings consistent with this decision.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Wise, and Stewart, JJ., concur.

Shaw, Bryan, Sellers, and Mendheim, JJ., concur in the result.

SELLERS, Justice (concurring in the result).

I agree that Kelly Butler, in his official capacity as Alabama Director of Finance, and Chris Roberts, in his official capacity as Director of the Alabama Office of Indigent Defense Services, were entitled to State immunity, which would deprive the trial court of subject-matter jurisdiction to certify the class of attorneys seeking retrospective monetary relief. Because claims of immunity bear on a trial court's jurisdiction, I write to express my opinion that such claims should be resolved before class certification. See Lyons v. River Rd. Constr., Inc., 858 So. 2d 257, 261 (Ala. 2003) (noting that the "constitutionally guaranteed principle of State immunity acts as a jurisdictional bar to an action against the State by precluding a court from exercising subject-matter jurisdiction"). Before certifying a class, a trial court is required to engage in a rigorous analysis to determine whether the prerequisites of Rule 23, Ala. R. Civ. P., have been satisfied. That analysis necessarily requires a trial court to hold hearings; to determine the parameters of discovery; to consider pleadings, motions, and evidentiary submissions; and to entertain arguments of counsel. Clearly,

the resolution of immunity defenses before conducting such a rigorous analysis not only promotes judicial economy and efficiency, but also comports with the principle that claims of immunity should be addressed at the earliest possible stage of litigation. See Barnhart v. Ingalls, 275 So. 3d 1112, 1121 n.6 (Ala. 2018) (finding it unnecessary to address whether the trial court should have addressed immunity claim before granting motion for class certification, but reiterating "the principle that claims of immunity should generally be addressed at the earliest possible stage of litigation because immunity is intended to shield a defendant not only from liability, but also from the burdens of defending a drawn-out lawsuit"). Here, the trial court and the parties engaged in extensive discovery to determine the applicability of class certification only to have this Court reverse the trial court's certification order based, in part, on the lack of subject-matter jurisdiction because of State immunity. Thus, I believe that immunity defenses should be considered and finally determined before energy and effort are expended to decide whether Rule 23 certification is appropriate.