STATE OF MICHIGAN

COURT OF APPEALS

MARGARET LAVELLE and LEEMYRTHIA LONG, On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellees,

v

BOARD OF COMMISSIONERS FOR SAGINAW COUNTY and THE SAGINAW COUNTY SOCIAL SERVICES BOARD,

Defendants-Appellants.

UNPUBLISHED
February 19, 2002

No. 225515
Saginaw Circuit Court
LC No. 98-023230-AW

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

MARKEY, J. (dissenting)

I respectfully dissent. Defendants claim that MCL 400.70 and MCL 400.66a grant defendant Board of Commissioners, and not the court, the authority and sole discretion to determine necessary funding amounts for the RCH program. Defendants claim that their assertion is further supported by the case of *Musselman v Governor*, 448 Mich 503; 533 NW2d 237 (1995). In response, plaintiffs claim that *King v Director of the Midland Co Dep't of Social Services*, 73 Mich App 253; 251 NW2d 270 (1977), supports the trial court's ruling that it has authority to determine monetary amounts for the RCH program.

In *King*, *supra* at 260, the defendant county discontinued general assistance payments required under MCL 400.55 because it had not appropriated sufficient funds to support the program. Like the RCH here, the general assistance program in *King* was mandatory upon the county. *Id*. at 259. Like the instant defendants, the defendant county in *King* asserted that the "within its discretion" language contained in MCL 400.70 supported its action of stopping general assistance payments. *Id*. at 258. This Court concluded that the defendant county did not have the right to suspend general assistance payments to eligible recipients because although MCL 400.70 allowed the board of commissioners to exercise its discretion in determining the amount of the appropriation necessary to maintain and administer welfare services, it did not allow the board to appropriate less funds than were sufficient to maintain the mandatory program. *Id*. at 261-262. This Court issued a writ of mandamus directing the payment of back benefits for the period of suspension. *Id*. at 262.

In comparison, the case defendants relied upon, *Musselman, supra*, involved a request for a writ of mandamus requiring the Governor and the Legislature to appropriate money to prefund health benefits that would have to be paid in the future to retired public school employees. The Court held that although the Legislature had violated the Michigan Constitution by not prefunding retirement health care benefits for public school employees, it was without authority to order an appropriation to mandate constitutional compliance.[1] *Id*. at 524. The Court reasoned that the drafters of the constitutional provision dealing with health care benefits, Const 1963, art 9, § 24, did not contemplate that a court could enforce the prefunding requirement. *Id*. at 522.

I agree with the trial court that the facts in this case "are sufficiently different from *Musselman* and close enough to *King* that it does have the power to force an appropriation." As the trial court correctly observed: "Unlike *Musselman,* the instant case *requires* an appropriation on the part of the defendants while no such requirement, only an expectation, was present in *Musselman*." I also agree with the trial court that the instant case does not contain the same evidence that a writ compelling an appropriation was not contemplated by the drafters of the constitutional provision as was the case in *Musselman*. Here, defendants have cited no constitutional provision that would bar the trial court from ordering funding from the county. Moreover, there is no statutory language contained in MCL 400.70 that precludes a court from ordering a specific appropriation in a case such as here where defendant Board has failed to provide the necessary amount to maintain the program in accordance with the statute. Although the Court in *King* did not explicitly state that a court has the power to order a specific appropriation, which is what the trial court here plans to do once an amount can be determined following discovery and trial, the *King* Court did determine that when a program to be funded under MCL 400.70 is a mandatory social welfare program, a writ of mandamus will be issued to order county funding, including back benefits for periods when the mandatory program was not operated because of the county's unlawful failure to provide sufficient funding. *King, supra* at 262. The *King* case strongly supports the contention that courts have authority to review the Board of Commissioners' funding decisions under MCL 400.70 and that courts can assess amounts for funding when a board has deliberately failed to provide sufficient funding for a mandatory social welfare program. In this case, the court's review of defendant Board of Commissioners' funding decision was necessary because $1.00 was obviously insufficient to operate the mandatory RCH program. The court is not engaging in the inappropriate practice of running the program, but rather will consider what monetary amounts are reasonable only after the completion of discovery and a trial. Further, MCL 600.4431, which provides that damages may be awarded in an action for mandamus, also supports the trial court's decision that it can award retroactive monetary relief to plaintiffs. MCL 600.4431 provides that damages may be awarded in an action for mandamus.

I also note that defendants' reliance on *Oakland Co v Michigan*, 456 Mich 144; 566 NW2d 616 (1997), and *Durant v Michigan*, 456 Mich 175; 566 NW2d 272 (1997), is misplaced. In these cases, the courts examined a provision of the Michigan Constitution known as "the Headlee Amendment" to apportion the responsibility for funding state-mandated programs or services between the state and local governments. In both of these cases, county officials or

[1] On rehearing in *Musselman v Governor*, 450 Mich 574; 545 NW2d 346 (1996), the Supreme Court denied mandamus again.

entities sought damages from the state governments because the state had improperly shifted the burden for funding state-mandated services from the state to the county. Unlike the present case, both *Oakland Co* and *Durant* involved who should fund the mandated services and not whether the services should be funded. Further, although defendants assert that the facts of the instant case do not warrant retroactive monetary relief because the Headlee Amendment cases instruct that retroactive damages should only be awarded in limited circumstances such as where a court order requiring funding of mandated programs has been violated, I disagree. First, the Court in *Durant, supra* at 210, n 39, specifically stated that it was not suggesting that damages are only appropriate when a party has failed to observe a judicial order. Second, as was the case in *Durant, supra* at 210, I believe that the instant case is one in which damages (i.e., retroactive monetary relief) are "necessary or proper" because defendants shirked their obligation to operate and fund the mandated RCH program from 1990 through at least 1998.

Thus, I conclude that the trial court has the authority to order defendant Board of Commissioners to provide certain prospective and retroactive RCH benefits following a trial at which the amount of past damages and future benefits would be set by the trial court, and I would affirm.

/s/ Jane E. Markey