

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE ex rel THOMAS REDMOND, et al.,

Appellant,

v.

STATE OF MISSOURI, et al.,

Respondent.

DOCKET NUMBER WD70836

Date: January 11, 2011

Appeal from:
Cole County Circuit Court
The Honorable Richard G. Callahan, Judge

Appellate Judges:
Division One: Joseph M. Ellis, Presiding Judge, Alok Ahuja and Cynthia L. Martin,
JJ.

Attorneys:
Richard W. Miller, Esq., Kansas City, MO, for appellant.
Robert L. Presson, Esq., Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

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Appellant,

v.

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Cole County

Before Division One Judges: Joseph M. Ellis, Presiding Judge, Alok Ahuja and Cynthia L. Martin, JJ.

Appellants Thomas Redmond and Margaret Redmond filed suit against the State, the Missouri Legislature, and the State Treasurer concerning the disposition of monies received under the Master Settlement Agreement that Missouri, as well as forty-five other states and several territories, entered into with the five largest tobacco companies in November 1998. The Redmonds allege that the State has failed to comply with the provisions of §§ 196.1100-196.1130, RSMo, which create the Life Sciences Research Trust Fund (the "Fund") in the state treasury, and direct that, beginning in Fiscal Year ("FY") 2007 and in perpetuity thereafter, the Treasurer shall deposit 25% of the monies received from the Agreement into the Fund. See § 196.1100.1. The statutes also specify that "[a]ll moneys that are appropriated by the general assembly from the life sciences research trust fund shall be appropriated to the life sciences research board to increase the capacity for quality of life sciences research at public and private not-for-profit institutions in the state of Missouri," and that "[m]oneys in the fund shall not be subject to appropriation for purposes other than those provided in sections 196.1100 to 196.1300 without a majority vote in each house of the general assembly."

The Redmonds allege that, through the conclusion of FY 2006, the State had received more than \$1 billion from the Master Settlement Agreement, but through FY 2008 had under-funded the Fund by almost \$300 million. The Redmonds also alleged that the State had authorized the use of Fund monies for purposes – such as plant and animal research – beyond those authorized by §§ 196.1100-196.1130.

The circuit court granted the defendants judgment on the pleadings on the Redmonds' declaratory judgment, accounting, and mandamus claims. The court held that the defendants were entitled to sovereign immunity, and that the statutes at issue did not create any mandatory duties enforceable by mandamus to deposit monies into the Fund and thereafter use those monies only for specified purposes. The Redmonds appeal.

AFFIRMED.

Division One holds:

The resolution of the Redmonds' claims is controlled by our recent decision in *State ex rel. Kansas City Symphony v. State*, 311 S.W.3d 272 (Mo. App. W.D. 2010), which involved very similar claims of legislative underfunding of the Missouri Arts Council Trust Fund. As *Kansas City Symphony* explains, the State's sovereign immunity is not waived where the statutes at issue do not contain an express waiver of sovereign immunity, and the Redmonds are not the recipients of a direct or contractual benefit from the funds at issue.

Further, the obligation to deposit a portion of the Master Settlement Agreement proceeds into the Fund, and use those funds for specified life sciences research activities, is not a mandatory duty enforceable by mandamus. The statutes make clear that monies from the Fund must be appropriated to the Life Sciences Research Board before their disbursement for the listed purposes. Moreover, it would create serious constitutional difficulties to hold that the statutes create a perpetual, continuing appropriation of funding for life sciences research. Although the relevant statutes may use the word "shall" in describing the obligation to deposit monies in the fund and to appropriate that money to the Board for specific purposes, the word "shall" in this context must be construed as merely directory, rather than mandatory, in light of the constitutional issues raised.

Opinion by: Alok Ahuja, Judge

January 11, 2011

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