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Askey v. Comm PA Dept Welfare

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1721

JOHN W. ASKEY;
BARBARA ASKEY,

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT
OF PUBLIC WELFARE

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 01-cv-000640)
District Judge: Honorable William L. Standish

Submitted Under Third Circuit LAR 34.1(a)
November 21, 2002

Before: BARRY and AMBRO, Circuit Judges
DOWD*, District Judge

(Opinion filed : November 27, 2002)

OPINION

*Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

AMBRO, Circuit Judge

The appellants, John and Barbara Askey, filed in the United States Bankruptcy Court for the Western District of Pennsylvania this adversary proceeding against the appellee, the Commonwealth of Pennsylvania Department of Public Welfare (“DPW”). The DPW filed a motion to dismiss, asserting Eleventh Amendment sovereign immunity from the lawsuit. The Bankruptcy Court granted the motion to dismiss on this ground, and the District Court affirmed. As those Courts recognized, this case is controlled by our decision in *In re Sacred Heart Hosp. of Norristown*, 133 F.3d 237 (3d Cir. 1998), and so we also affirm.

We further agree with the District Court’s conclusion that, because the Askeys did not attempt in the Bankruptcy Court to amend their complaint to sue for prospective injunctive relief from the Secretary of the DPW in his official capacity, they waived the *Ex Parte Young*, 209 U.S. 123 (1908), argument that they now seek to present.

Accordingly, we affirm the dismissal of this adversary proceeding.

TO THE CLERK:

Please file the foregoing Opinion.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge