

SUPREME COURT OF KENTUCKY  
CASE NO. 2005-SC-332 & 2005-SC-842-D  
(2004-CA-000500-MR)

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MOVANT/  
CROSS-RESPONDENT

BOYD FISCAL COURT

VS.

PHILIP STURGILL, individually and as  
Sheriff of Boyd County, Kentucky, and  
FIDELITY & DEPOSIT OF MARYLAND

RESPONDENTS/  
CROSS-MOVANTS

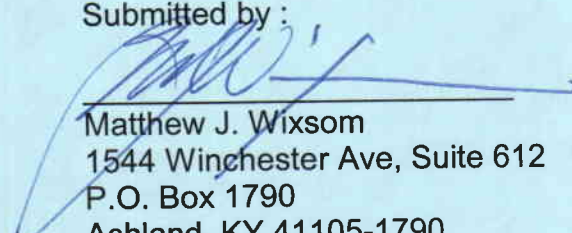
Boyd Circuit Court  
Action No. 01-CI-00643

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**BRIEF FOR RESPONDENTS/ CROSS-MOVANTS  
PHILIP STURGILL AND FIDELITY & DEPOSIT OF MARYLAND**

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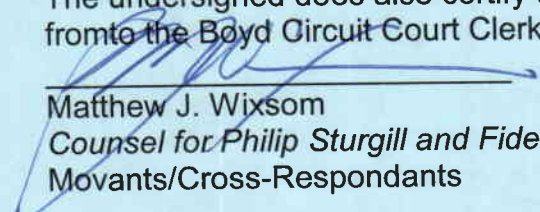
CERTIFICATE REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by mailing the same via first class mail, postage prepaid on March 31, 2006 to:

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## INTRODUCTION

The Circuit Court entered summary judgment based solely on an analysis of the Sheriff's records by the Fiscal Court's attorney, without any depositions having been taken, no expert witnesses utilized, and where significant material facts remained in contention. The Circuit Court held that the Sheriff was not entitled by statute to accept donations and held the Sheriff liable for funds not surrendered at the end of each fiscal year even though adequate funds had been surrendered from operating funds in the subsequent year to cover any expenditures. The Circuit Court failed to give the Sheriff credit from the operating account monies surrendered to offset donated funds surrendered in the prior year, and further dismissed the Sheriff's claim for abuse of process.

The Court of Appeals reversed the Circuit Court, holding that the Sheriff could accept donations under the terms of the statute and further finding that the Boyd Fiscal Court failed to place an affirmative cap of on the Sheriff's 1999 budget. The Court of Appeals praised both the Sheriff for his use of donated funds and the donors for their generosity. The Court of Appeals also upheld the dismissal of the Sheriff's counterclaim.

The case has limited value as precedent, as the General Assembly changed KRS 61.310 in June of 2005 to set aside the restriction created by OAG 82- 433 and to clarify when and how the Sheriff should account for donations.

**STATEMENT IN SUPPORT OF ORAL ARGUMENT**

This case involves the interpretation of two different statutes concerning accepting donations by a sheriff and how those donations are to be accounted for, when there remained significant material issues of fact to be resolved and no deposition testimony was ever taken on any issues prior to summary judgment.

Because of the interpretation of the statute concerning the circumstances under which a Sheriff may accept donations, whether or not those donations are considered "income" of the office for the purpose of including donated monies in the operating account of the sheriff, and whether the summary judgment was appropriate when there are significant material issues of fact in contention and no depositions have been taken, the appellant requests the opportunity for oral argument.

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## COUNTERSTATEMENT OF THE CASE

This case arises from numerous donations being made to the Boyd County Sheriff's office by businesses and private individuals in Boyd County totaling \$160,868.00. (Transcript "Table of Exhibits Def",<sup>1</sup> Exhibit 1). The then County Judge Executive knew about the donations. His affidavit is of record. (Transcript "Table of Exhibits Def", Exhibit 4) The County Attorney knew about the donations. His affidavit is of record. (Transcript "Table of Exhibits Def, Exhibit 6) The donations were not a secret.<sup>2</sup> The local paper ran numerous articles about donations and the good things the Sheriff's department was doing with the donated money. The Court of Appeals quoted numerous such articles in its opinion.

The donated funds were deposited in two separate accounts in local banks. One account for general donated funds, and a second account just for "bullet proof" vests which was used in conjunction with a funds matching grant. In addition to the donated funds accounts and the sheriff's general account, there were also separate accounts for the Block Grant funds, which were a requirement of the Grants. All accounts were at local banks, also as required.<sup>3</sup>

Donated funds were kept separate from fee generated funds. They were not,

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<sup>1</sup>The Transcript has the "Table of Exhibits Def." in a separate envelope with the record. It has no separate page number. It was originally attached as Exhibits to Sheriff Sturgill's Response to Boyd County Fiscal Court's Second Motion for Final Summary Judgment, at Transcript pp 317-347.

<sup>2</sup>Nor were they "illegal" as the Fiscal Court repeatedly contends.

<sup>3</sup>The accounts were no more "private accounts", as the Fiscal Court suggests, than the account for fee generated funds, or the Block Grant accounts which were also held in a local bank in the Sheriff's name.

however surrendered to the Fiscal Court as excess at the end of the fiscal year, as fee generated accounts were required to be. Even if the funds had been surrendered, in each subsequent year, the Sheriff surrendered sufficient fee generated funds to have covered any expenditures in donated funds. (Transcript, "Table of Exhibits Def.", Exhibit 5). The use of the donated funds merely freed up fee generated funds for surrender to the Fiscal Court at year end.

When an audit commissioned by the Fiscal Court and undertaken by the Kentucky State Auditor failed to find any significant problems with the donated fund accounts, the Fiscal Court instituted this lawsuit. The Audit did find some problems with the Sheriff's accounting, but it did not find any evidence of wrongdoing.

There have been no depositions taken in this case.

The Boyd County Fiscal Court has not identified any expert witnesses.

The only person who has reviewed the Boyd County Sheriff's accounts on behalf of the Fiscal Court is the Fiscal Court's own attorney. The Circuit Court relied entirely on the Fiscal Court's attorney's analysis.

The only audit conducted by an accounting professional was the Audit by the Kentucky State Auditor, who previously audited the Sheriff's records at the request of the Fiscal Court. (Transcript "Table of Exhibits Def.", Exhibit 1) The Fiscal Court had resisted obtaining any evidence from the State Auditor, so the Sheriff placed the Audit report in the record by Affidavit.

The only "physical evidence" in this case is the records for the donated funds account and the block grant accounts provided by the Boyd County Sheriff. They were hand delivered to the Fiscal Court's attorney after making an objection under

Civil Rule 34.02(2) that the Sheriff's personal tax return should not be a matter of public record as he filed jointly with his wife, who is not a party. The Sheriff also objected to the purchase records being public as the Sheriff had purchased several items for the department not usually found in a more rural sheriff's department, and he did not want their existence made public knowledge. The Circuit Judge sustained the Sheriff's objection and the records (which had already been copied) were promptly delivered.<sup>4</sup>

All of the affidavits in the record were placed there by the Sheriff. The minutes of the Fiscal Court were also introduced by the Sheriff into the record. (Transcript "Table of Exhibits Def.) In fact, the only evidence in this case was supplied by the Sheriff, and it supports his position.

The Fiscal Court originally prayed in its complaint that "The fiscal court's approval of the aforesaid [Sheriff's annual] settlements should be set aside and the settlements should be reopened to include the aforesaid unreported income and expenditures." (Transcript pp. 10-12) Unfortunately for the Fiscal Court, doing this results in no net gain to the Fiscal Court. If money is surrendered in one year, then the monies spent in the following year would only serve to reduce the amount of excess fees available for surrender to the Fiscal Court by the amount surrendered in the prior year.

Once this was argued to the Circuit Court by the Sheriff, the Fiscal Court changed its argument so that only the money remaining in the donated funds

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<sup>4</sup>The Sheriff did not "at first resisted providing the requested documents . . ." as the Fiscal Court contends.

accounts at the end of a fiscal year were surrendered and the sheriff was not entitled to deduct moneys spent in the subsequent year from the funds the Sheriff had surrendered to the Fiscal Court. This new argument meant that the County got to keep all of the equipment purchased with the donated funds, but did not give the Sheriff any credit for such purchases against his subsequent year's excess fees. For each and every subsequent year, the Sheriff had adequate excess funds to cover such expenditures. (Transcript "Table of Exhibits Def.", Exhibit 5).

The Fiscal Court was then faced with trying to recover donated funds which had been transferred to the Block Grant accounts in one year, and then expended pursuant to the terms of the Block Grant in the subsequent year. To avoid the expenditures, the Fiscal Court contended that any donated funds transferred to the Block Grant accounts were not actually expended in the year the transfer was made, since the Sheriff controlled both accounts. The Fiscal Court then argued that these funds should also be surrendered, despite that fact that the money was removed from the donated funds account and co-mingled with Block Grant funds and ultimately spent on equipment for the Sheriff's department under the terms of the Grant.<sup>5</sup>

The Fiscal Court next contended that the Sheriff exceeded his budget cap for 1999. (Transcript p. 305) The problem with the Fiscal Court's argument is that it never set a cap. It "accepted" the estimated budget submitted by the Sheriff, but

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<sup>5</sup>Block grants are funds awarded to the Fiscal Court but supervised, pursuant to the terms of the Grant, by the Sheriff. They, like donations, are not fee generated funds and are not subject to surrender at the end of a fiscal year.

took no affirmative action to cap the budget. (Transcript "Table of Exhibits", Def., Exhibit 13) The Fiscal Court did affirmatively cap deputy salaries and later raised that cap. (Transcript "Table of Exhibits Def.", Exhibit 14) The only evidence in the record on this issue is the Fiscal Court's own minutes, which support the Sheriff's position. (Transcript "Table of Exhibits Def.", Exhibits 15, 16).

Despite there being no depositions, no expert testimony submitted by the Fiscal Court, and the only affidavits in the record being submitted by the Sheriff supporting his position, and the Fiscal Court's only "analysis" being done by its attorney, and numerous facts still remaining at issue, the Circuit Court ruled in favor of the Fiscal Court, compelling the Sheriff to surrender monies that had already been spent on equipment for the sheriff's department. (Transcript pp. 353-357)

The Court of Appeals reversed, finding that the Statutes allowed the Sheriff to accept the type of donations received and praising the Sheriff for his efforts to upgrade the department. The Court of Appeals also found that the Fiscal Court had not taken the affirmative action required by Statute to set a cap on the Sheriff's spending.

The Court of Appeals did sustain the Circuit Court's dismissal of the Sheriff's counterclaim. It did not, however, need to address the Sheriff's contention that there were significant issues of material fact which should have precluded the Circuit Court from issuing any summary judgment against the Sheriff.

This appeal of the Court of Appeals ruling was filed by the Fiscal Court. The Sheriff cross-appealed on the issue of the appropriateness of summary judgment at the Circuit Court level.

**ARGUMENT ONE:**

**THE AMENDMENT MADE TO KRS 61.310 IN 2005  
PROVIDED GUIDANCE TO A SHERIFF ON HOW TO HANDLE  
DONATIONS WHICH WERE ALREADY PERMITTED**

The amendment made to KRS 61.310, which became effective on June 20, 2005 provided guidance on how a sheriff should account for the donations which were already authorized under KRS 61.310 prior to June 20, 2005. The amendments to the statute also nullified the chilling effects of OAG 82-433, which had opined that despite the plain language of KRS 61.310, a sheriff did not have the statutory authority to accept donations. Rather than being “nugatory”<sup>6</sup>, as the Fiscal Court suggests, the amendments enacted by the legislature removed the impediment of OAG 82-433 and provided guidelines on how the donated funds should be accounted for, including explicit guidance on providing separate accounts which the earlier legislation had only implied.

Interestingly enough, the Boyd County Sheriff did make the donations public, kept them in a separate bank account, and in accordance with both pre-and post 2005 guidelines, did not use the funds for payment of either deputy salaries or to pay himself. What he did not do is surrender the unspent funds at the end of each fiscal year, since they were not “income” to his office. The post-2005 statute now requires the surrender of the unspent funds at year end, in the same fashion that unspent income to the office is surrendered. Future Sheriffs will not have to contend with these with interpreting the relevant statutes, as the Legislature has now

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<sup>6</sup>Commonwealth ex rel. Martin v. Tom Moore Distillery Co., Ky. 152 S.W.2d 962, 967 (1939).

provided explicit guidelines on how the donations should be handled.

Whether the pre-2005 statutes allowed donations to be accepted and how those funds were to be accounted for remain issues only in this case.

The Legislature, under KRS 446.080, has provided general guidelines on the interpretation of statutes:

(1) All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state. . . .

(4) All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.

This Court has held that "All words and phrases shall be construed according to the common and approved usage of language." Commonwealth of Kentucky v. Plowman, 86 S.W.3d 47, 49 (Ky. 2002).

This Court has also provided ample guidelines on the interpretation of statutes. "All statutes should be interpreted to give them meaning, with each section construed to be in accord with the statute as a whole. Commonwealth Transportation Cabinet v. Tarter, 802 S.W.2d 944, 946 (Ky. App.1990), citing George v. Scent, 346 S.W. 2d 784 (Ky. App. 1961). The courts have also noted that "It is a well established rule of statutory construction that all words and phrases of a statute are to be construed according to common and approved usage of language, with a view to promote their objects." Poole Truck Line, Inc. v. Com., Transp. Cabinet/Department of Highways By and Through Kelly, 892 S.W.2d 611, 613 (Ky. App. 1995). "Words of a statute , if clear, are determinative of legislative

intent.” Court of Justice ex rel. Administrative Office of the Courts v. Oney , 94 S.W.3d 814, 816 (Ky. App. 2000), citing Gateway Construction Co. v. Walbaum, 356 S.W.2d 247 (Ky. 1962).

The pre-2005, KRS 61.310 specifically addressed the compensation of Peace Officers, including under KRS 61.310(1), a sheriff. A reasonable construction of the statute is that it was designed to stop “quid pro quo” donations to a peace officer. KRS 61.310 does not prohibit a Sheriff from accepting donations from private individuals where such donations were not received “quid pro quo” and where such donations were used by the Sheriff to buy equipment for the Sheriff’s department, and were **not** used to fund department salaries or other compensation to the Sheriff, deputies, or other employees of the sheriff’s department. The statute was designed to stop “donations” tied to specific services rendered. KRS 61.310(2) specifically speaks to this by stating that:

No peace officer shall receive any compensation or remuneration directly or indirectly, from any person **for the performance of any service or duty** except that he may be compensated for employment authorized by subsection (4) of this section. . . . [emphasis added]

Subparagraph (3) of KRS 61.310 further goes on to restrict the peace officers to payment for their duties from public funds:

Peace officers shall receive **for the performance of their services and duties** only such compensation or remuneration as is regularly provided and paid out of the public funds to the amount and in the manner provided by law except that they may be compensated from private funds for employment authorized by subsection (4)<sup>7</sup> of this

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<sup>7</sup>KRS 61.310(4) allows an off duty peace officer to act in private employment as a guard or watchmen or in any other similar or private employment, except in labor disputes.

section. **Donations made by persons to any governmental unit or officer thereof do not constitute public funds within the meaning of this subsection.** [emphasis added].

The key words which demonstrate the intent of the legislature, to prohibit “quid pro quo” donations, was “for the performance of their services or duties”. The Legislature specifically stated that “donations made by persons to any governmental unit or *officer thereof do not constitute public funds*”, clearly meaning that **donations** cannot be used to pay deputies salaries or to compensate a sheriff.

The statute, by its plain language, contemplates **donations** not only to a governmental unit, but also an “officer thereof”. KRS 61.310(7) provides the appropriate sanction to one who attempts to purchase the “performance of any public duty” with any gift or donation, and in fact, the sanction is **limited** to purchasing the “performance of any public duty”. The funds are thus limited, by statute, to being utilized for non-salary expenditures.

This restriction appears to follow the donated money as the funds are not considered **public funds**<sup>8</sup> as clearly set forth in the statute. The statute creates this special category of funds, which can best be described as simply as “donations”, which have these specific restrictions on their use simply because they originated from private persons or entities.

Not only were donations to the Sheriff **anticipated** under pre-2005 KRS 61.310(3), the legislature put specific restrictions on their use. Pre-2005 KRS

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<sup>8</sup>It would appear that if the donation was made to the Fiscal Court and then transferred to the sheriff’s department, the restrictions would still apply, as the Fiscal Court is “any governmental unit” under the provisions of KRS 61.310(3).

61.310 speaks to such donations as are at issue here, and it is the ONLY statute to address the issue directly: **"Donations made by persons to any governmental unit or officer thereof do not constitute public funds within the meaning of this subsection."** The touchstone for interpretation of statutes for the last forty-five years is the Court's guidance in George v. Scent, 346 S.W.2d 784, 789 (Ky. App. 1961):

The presumption is that the Legislature intends an Act to be effective as an entirety. No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be accorded to every part of the Act.

"We begin by noting that, under general rules of statutory construction, we may not interpret a statute at variance with its stated language" Layne v. Newberg, 841 S.W.2d 181, 183 (Ky. 1992) citing Gateway Construction v. Waldbaum, 356 S.W.2d 247 (Ky. 1962). See also Hoy v. Kentucky Industrial Revitalization Authority, 907 S.W.2d 766, 768, (Ky. 1995). "The most logical and effective manner by which to determine the intent of the legislature is simply to analyze the plain meaning of the statutory language '[r]esort must be had to the words, which are decisive if they are clear.'" Stephenson v. Woodward, 182 S.W.3d 162, 169-170 (Ky. 2006) citing Gateway Construction v. Waldbaum, 356 S.W.2d 247, 249 (Ky. 1962). "An unambiguous statute is to be applied without resort to any outside aids." Kentucky Farm Bureau Mutual Ins. Co. v. Ryan, 177 S.W.3d 797, 800 (Ky. 2005) citing Delta Air Lines, Inc. v. Commonwealth Revenue Cabinet, 698 S.W. 2d 14 (Ky. 1985) and Gateway Construction v. Waldbaum, 356 S.W.2d 247 (Ky. 1962). See also

Commonwealth of Kentucky v. Plowman, supra. at 49.

Had the legislature intended to preclude donations to the sheriff it had ample opportunity to do so in a clear fashion. It had not chosen to place such a restriction prior to June of 2005, and has now provided explicit guidelines on how donations should be made and accounted for. The pre-2005 statute is clear. Donations were anticipated and their use restricted. There is no ambiguity for the Court to interpret.

**ARGUMENT TWO:**

**DONATIONS ARE NOT INCOME TO THE SHERIFF  
UNDER KRS 134.310**

The Revision to KRS 61.310 (8)(c), effective on June 20, 2005, specifically required that "All donations made in accordance with this subsection shall be expended and audited in the same manner as other funds or property of the sheriff's office." Prior to June of 2005, there was no such limitation on donated funds and it is only through this amendment that donated funds become subject to the provisions of KRS 134.310.

Prior to June 20, 2005, KRS 134.310 did not require a Sheriff to include in his annual settlement with the Fiscal Court those monies received as donations to the Sheriff's department that year, where such donations are not "funds received by his office for official services . . . and the total funds received as commissions for collecting state, county and school taxes;" under KRS 134.310 (5)(a). Donated funds are not "other income of his office" under KRS 134.310 (6) when such funds were not generated by any acts of the Sheriff's office.

The annual settlement by a sheriff is governed by KRS 134.310. The

provisions of that statute were followed by the Boyd County Sheriff for the years in question and the annual settlements have previously been accepted by the Fiscal Court. This was done with the knowledge that there were donations to the Sheriff's department from private individuals, or where the Fiscal Court should have known, as the existence of the donations and their use to upgrade the sheriff's department equipment was published in various articles in the local papers.(Transcript "Table of Exhibits Def." Exhibit 4, 17)

KRS 134.310(5) directly applies to Boyd County, as it has a population of less than seventy thousand. This section of the statute requires a sheriff to file the following with his final settlement:

- (a) A complete statement of all funds received by his office **for official services**, showing separately the **total income received by his office for services rendered**, exclusive of his commissions for collecting taxes, and **the total funds received as commissions** for collecting state, county, and school taxes; and
- (b) A complete statement of all expenditures of his office, including his salary, compensation of deputies and assistants, and reasonable expenses. [emphasis added]

The section does not require the sheriff to provide an accounting for donated funds as donated funds are not addressed in KRS 134.310. Prior to June of 2005 there was no requirement to account for or surrender donated funds at the end of each fiscal year.

This Court has repeatedly held that "statutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required." Kentucky Farm Bureau Mutual Ins. Co. v. Ryan, supra at 800. "We lend words of a statute their normal, ordinary, everyday

meaning.” Stephenson v. Woodward, supra at 170, citing Gateway Construction v. Waldbaum, at 249. See also Popplewell’s Alligator Dock No. 1, Inc. v. Revenue Cabinet, 133 S.W.3d 456, 464-465 (Ky. 2004). As this Court noted, “We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used.” Beckham v. Board of Education of Jefferson County, 873 S.W. 2d 575, 577 (Ky. 1994) citing Gateway Construction v. Waldbaum, 356 S.W.2d 247 (Ky. 1962).

The Fiscal Court contends that donated funds are “other income of his office” under the provisions of this section, despite the fact that donated funds are not considered public funds under KRS 61.310 and must be tracked separately due the restrictions on their use imposed by that statute. There is no statutory definition of “other income”, nor does the case law interpreting KRS 134.310 shed any light on what is “other income”, except that it includes income from investments of monies collected by the sheriff’s department.<sup>9</sup> “Income” generally is regarded as “The amount of money or its equivalent received during a period of time in exchange for labor or services from the sale of goods or property, or as profit from financial investments.”<sup>10</sup> Quite clearly, donations are not considered “income” under this definition, as peace officers are prohibited from accepting monies “**for the performance of any service or duty**” under KRS 61.310.

Only if “income” is any funds received by the sheriff’s department, do

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<sup>9</sup>See Marshall v. Com. ex rel. Hatchett, 20 S.W.3d 478 (Ky. App. 2000).

<sup>10</sup>American Heritage Dictionary of the English Language, 1973 edition.

donations become classed as "income". The Legislature, on June 20, 2005 explicitly changed this so that donated funds are accounted for in the same fashion as income. The Legislature could have just as easily made donations "income", it chose not to do so. The Legislature, however, kept the requirement that donations be accounted for separately from the fee generated income funds of the sheriff's department. "The universal rule is, that in construing statutes it must be presumed that the Legislature intended *something* by what it attempted to do . . ." Reyes v. Hardin County, 55 S.W.3d 337, 342 (Ky. 2001) citing Grieb v. National Bond & Inv. Co., 94 S.W. 2d 612, 617 (1936).

The 2005 amendment to KRS 61.310 changed the accounting period for donations and now requires a Sheriff to either surrender or expend donated funds in the year they are received, and to account for the funds just like any other funds of the sheriff. Prior to this amendment, there was no such requirement.

The Fiscal Court's reliance on Funk v. Milliken, 317 S.W.2d 499 (Ky. 1958) for the proposition that donations to the sheriff's department must be paid over as "receipts" was likewise misplaced. Funk only discusses these receipts in terms of **fees** and **commissions**. Nowhere in Funk is there any mention of income other than **fees** or **commissions**. KRS 134.310 specifically narrows what is required to be accounted for and surrendered at the annual accounting. It is very specific: income for "services rendered", "commissions for collecting . . . taxes", and "other income, . . . including investment income".

The interpretation espoused by the Fiscal Court and accepted by the Trial

Court is simply not supported by the plain language of the statute, nor, prior to June of 2005, was there any legislative intent that donations must also be surrendered if not expended in the year they are received.

**ARGUMENT THREE:**

**EVEN IF THE SHERIFF SHOULD HAVE SURRENDERED  
UNSPENT DONATIONS EACH FISCAL YEAR  
HE SHOULD HAVE BEEN GIVEN CREDIT  
FOR ANY MONIES EXPENDED  
FOR EQUIPMENT FOR THE DEPARTMENT**

If donations are income to the Sheriff, as the Fiscal Court contends, then KRS 134.310 requires that the sheriff be given credit for any equipment he purchased in subsequent years with money that the Fiscal Court contends he should have surrendered. For each and every subsequent year, the Sheriff had sufficient excess income generated funds, which were surrendered, to have purchased the equipment he bought with donated funds.

The Fiscal Court attempted to sidestep this statutory requirement that the sheriff be given credit for equipment expenditures, by stating that the Sheriff's accountings for the years in question have already been accepted and so should not be reopened. It is, however, exactly what the Fiscal Court initially requested in its complaint and what is required by KRS 134.310 if the donated funds are to be included as "income" to the sheriff.

Prior to June 20, 2005 there was no requirement to surrender donated funds to the Fiscal Court if they were not expended in any year. If, however, donations were "income" for the purposes of KRS 134.310, then credit must also be given

under KRS 134.310 for any funds expended for equipment purchased for the Boyd County Sheriff's Department from such funds since the sheriff was not required to surrender any monies if the same were utilized to fund equipment for the department.

Both prior to June 20, 2005 and after, a sheriff is under no compulsion to surrender any excess funds if the same were utilized to fund equipment for the department. KRS 134.310(6) clearly states:

... the sheriff shall pay to the fiscal court any fees, commissions, and other income of his office, including income from investments, which exceed the sum of his maximum salary as permitted by the Constitution **and other reasonable expenses**, including compensation of deputies and assistants. [emphasis added]

The same purchases made with donated funds could easily have been made from fee generated funds. In this case, the Sheriff surrendered to the Fiscal Court sufficient excess funds under KRS 134.310 in each subsequent year to have covered the purchase price of the equipment had donated funds not been used.

The Fiscal Court has already received the excess revenue generated funds in each and every year that it sought a refund from the Sheriff. Part of the reason there were excess revenue generated funds is that the Sheriff used donated monies instead of revenue generated monies to fund equipment. That left excess revenue monies which could be, and were, surrendered to the Fiscal Court.

What this also means is that if the Sheriff was required to surrender unspent donated funds at year end, then the Sheriff surrendered too much money to the Fiscal Court in those years where the expenditures from donated funds exceeded

the donations and, as such, the Sheriff would then be entitled to a **refund** from the Fiscal Court for those years. The net result of all of this "accounting" is that no money is due either the Sheriff or the Fiscal Court.

The Fiscal Court, however, wants the donated funds **and** the equipment purchased with the donated funds as well. Under KRS 134.310, to say nothing of the principles of equity, they are not entitled to both. The Circuit Court's ruling did not give the Sheriff credit for the equipment purchased. (Transcript pp. 353-357) All donated funds were expended for equipment or surrendered to the Fiscal Court. (Transcript "Table of Exhibits Def.", Exhibit 1)

To allow the money to be utilized for the benefit of the people of Boyd County through a better equipped Sheriff's department and then, years later demand the funds back from the Sheriff is simply unconscionable, especially when the Fiscal Court<sup>11</sup> has already not only received the benefit of the equipment purchased from the donated funds, but also the excess funds each year which were freed up **because** the Sheriff used donated funds instead of revenue generated funds to buy the equipment.

The defenses of estoppel and laches were also raised by the Sheriff (Transcript pp 22-23) and apply in this case, which may make the entire controversy as to whether or not a Sheriff may accept donations moot.

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The Fiscal Court knew or should have known about the existence of the donations, as the donations were covered by the local newspaper on several occasions and the affidavit of the former County Judge Executive is of record that he certainly knew about the donations.

The decision of the Court of Appeals did correctly interpret both KRS 61.310 and KRS 134.310, giving the Sheriff full credit for the amounts expended on behalf of the department from the donations he was permitted under KRS 61.310 to receive.

**ARGUMENT FOUR:**

**SUMMARY JUDGMENT IS NOT APPROPRIATE  
WHEN MATERIAL FACTS ARE IN CONTENTION**

This Court has reiterated time and time again that summary judgment is not appropriate where there are material issues of fact in contention. The citations alone to this premise would exhaust the page allowance for this brief.

There have been no depositions taken in this case. The only affidavits in the record were placed there by the Sheriff in support of his position. (Transcript "Table of Exhibits Def.") The only minutes of the Fiscal Court were placed in the record by the Sheriff in support of his position. (Transcript "Table of Exhibits Def.")

The only person to review the Sheriff's records of the donated funds for the Boyd Fiscal Court was its **own attorney**. The numbers argued by the Fiscal Court's attorney do not match the bank statements. The Circuit Court based its ruling on this attorney's review. No accounting professional, other than the State Auditor, has reviewed the records. Only the State Auditor's report is in the record.

The Fiscal Court attempts to make much of the fact that for over \$24,000.00 the invoices no longer exist. The Fiscal Court has never taken the Sheriff's deposition about the invoices to find out why. The State Auditor's office did talk to the Sheriff as part of its audit, and found no evidence of wrongdoing.

### A. THERE ARE MATERIAL FACTS IN CONTENTION

The Circuit Court relied totally on the analysis of the Fiscal Court's attorney to determine the amounts due from the Sheriff. The only evidence in the record was supplied by the Sheriff, and it supported his contentions. The Circuit Court gave no credit to the sheriff for the equipment purchased in subsequent years despite the plain language of the KRS 134.310. There was sufficient excess funds, which were surrendered to the Fiscal Court, to have covered these expenditures from fee generated funds.

The only affidavits in the record were placed there by the Sheriff. Billy Joe Ross, the prior County Judge Executive, stated he was aware of the donations being given to the Sheriff's department. (Transcript "Table of Exhibits Def.", Exhibit 4) The County Attorney was aware of the donations as well. (Transcript "Table of Exhibits Def.", Exhibit 6) The County Judge Executive even signed for the Block Grant Funds which are the subject of this litigation. (Transcript "Table of Exhibits Def." Exhibit 3) The donated funds, as well as the Block Grants, and money for "Bullet-proof" vests were all maintained in separate local bank accounts. As the Court of Appeals noted at some length in its opinion, not only were the donations not a secret, their existence was published in extensive articles in Ashland's *Daily Independent* which described the good things being done with donated funds.

The only copies in the record of the Fiscal Court minutes were placed there by the Sheriff. As such, the only evidence in the record on the Sheriff "over spending" his "budget", as found by the Circuit Court, was the minutes of the Fiscal

Court itself ( provided by the Sheriff) which showed exactly the opposite. (Transcript "Table of Exhibits Def." Exhibits 12, 13, 14, 15, 16) The Circuit Court held the Sheriff overspent his budget, when no affirmative cap had been set on anything other than deputy salaries, and that where that salary cap had been increased by the Fiscal Court itself. (Transcript "Table of Exhibits Def.", Exhibit 14) The Boyd Fiscal Court's own records show there was no such overspending. Despite the records proving otherwise, the Circuit Court held the Sheriff responsible for "overspending" a "budget cap" that was never fixed and even if it was fixed, was not exceeded.

Other than the bank records, which showed the amounts in the donated funds bank accounts at the end of the year, the only other account information in the record was provided by the Sheriff, showing the sums surrendered each year to the Fiscal Court from the Sheriff's revenue generated accounts. (Transcript "Table of Exhibits Def." Exhibit 5) The evidence in the record shows that if all donated funds were lumped in with revenue generated funds each fiscal year, as prayed for in the Fiscal Court's own Complaint, and any unused donations were to be surrendered at the end of each fiscal year, even then there were sufficient revenue generated funds surrendered in the subsequent fiscal year to have been utilized to cover all expenditures. (Transcript "Table of Exhibits Def.", Exhibit 5).

These are all material issues of fact. They remain in contention. The only **evidence** in the record is that submitted by the Sheriff in support of his position.

**B. THE ANALYSIS BY THE FISCAL COURT'S ATTORNEY  
IS NOT EVIDENCE**

The Circuit Court based its decision in this case on the analysis of the Sheriff's records by the Boyd Fiscal Court's attorney. No independent expert has testified on behalf of the Fiscal Court. There is no evidence on the part of the Fiscal Court to rebut. The documents hardly "speak for themselves", as they consist of years of bank records, invoices, Block Grants, and other financial records.

The crux of the Fiscal Court's argument in its brief, (Transcript p. 305) despite claiming in its Complaint that donations should be construed as income in the year received, (Transcript pp. 10-12) was that the sheriff should not be given credit for expenditures in subsequent years, and furthermore that the donations should be looked at **separately** on an annual basis, but **not** added into the sheriff's other revenues to determine what amount, if any should have been surrendered by the Sheriff in any given year. Only by this accounting "sleight-of-hand" (Transcript p. 305) did the Fiscal Court claim **any** funds. It is not a result supported by KRS 134.310.

The Fiscal Court then argued to recoup donated funds which had been transferred to, and commingled with, Local Block Grant monies, where the donated funds were transferred to the Local Block Grant Fund in one fiscal year but not expended under the Grant until the following fiscal year.

The State Auditor's Report noted that the money was accounted for, but that some of the expenditures by the Sheriff from the donated funds special account lacked complete documentation but found no malfeasance on the part of the

Sheriff.<sup>12</sup> (Transcript "Table of Exhibits Def.", Exhibit 1) The expenditures from all of these accounts were made by check and have left the resulting audit trail which shows that all the funds have been expended or surrendered to the Fiscal Court, including the Block Grants Special Account and the Memorial Bullet Proof Vest Account. Those accounts were audited by the State Auditor with no "missing" funds. (Transcript "Table of Exhibits Def.", Exhibit 1)

This constitutes a material issue of fact still in contention between the parties. The bank records document what was received in donations, what interest was earned, what amounts were refunded to the Sheriff's department for items purchased individually by the Sheriff or deputies, and most importantly, provides a record of all checks issued. There is no **testimony** in the record whatsoever on **how** the attorney for the Fiscal Court arrived at the figures used in the Fiscal Court's brief and which were incorporated into the subsequent order of the Circuit Court.

The total of the donated funds was \$160,868.00. The Fiscal Court's accounting simply did not match the actual amounts donated. That fact was raised before the Circuit Court (Transcript pp. 317-347, Transcript "Table of Exhibits Def.") and should have precluded Summary Judgment in this matter. Since the only analysis put forth by the Fiscal Court's was that of its own attorney, there was no "evidence" upon which the Circuit Court could have based its decision.

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<sup>12</sup>Mail order purchases using the Sheriff's personal credit card were reimbursed from the fund. The person opening the order did not always put the invoice in the file, as should have been done.

**C. THE CIRCUIT COURT DID NOT  
GIVE THE SHERIFF CREDIT FOR DONATED FUNDS  
TRANSFERRED TO A LOCAL BLOCK GRANT**

The Circuit Court did not properly credit the Sheriff with funds he transferred to a Block Grant account in 1997 but were not expended from the Block Grant account until 1998, when the Sheriff upgraded the radios and lights in all the sheriff department cruisers.

Block Grant monies are awarded to the Fiscal Court but administered by the Sheriff, and are not "income" to the Sheriff's department under KRS 134.310 in the year they are awarded to the Fiscal Court<sup>13</sup>. Block Grant funds were not included in the Boyd County Sheriff's "budget" as they are over and above any budgeted funds generated by the Sheriff's office. In the Sheriff's Answers to Interrogatories in this case, the Sheriff surrendered information on all special accounts managed by the Sheriff's Department, including the Local Block Grant money accounts.

The Grant monies were not included in any annual accounting to the Boyd County Fiscal Court because they were **not required** to be included in the annual accounting, as they were not funds which were generated by the Sheriff's Department. All of the funds of the Block Grant, including those funds transferred to it by the Sheriff's Department from the donated money account, were spent pursuant to the terms of the Grant.

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<sup>13</sup>Local Block Grants are funded by the United States Department of Justice and are managed by the Commonwealth of Kentucky Justice Cabinet. Block Grant awards are made directly to the Fiscal Court but are administered by the Sheriff's Department. The County Judge Executive signs for the funds. (Transcript "Table of Exhibits Def." Exhibit 9, 10)

The guidelines for administering these accounts are different from KRS requirements, and are spelled out in the Grant itself. They are not subject to the yearly turnover of funds under KRS 134.310. Required reports are made back to the agency awarding the grant money and the expenditures are overseen by the awarding agency, and not the Fiscal Court. The documentation for the grants was required to be kept for at least three years and was subject to audit by the terms of the Grant itself. This documentation, available to the Trial Court, (Transcript "Table of Exhibits Def." Exhibits 7,8,9,10, 11) showed that these Grants were made to the Boyd Fiscal Court but were administered by the Sheriff's Department because they were for the use of the Sheriff's Department.

A Sheriff is **required** by the Grant to set up a separate bank account for these funds. Grants are valid for a period of 18 to 24 months, depending upon the particular grant. Sheriff department funds, whether donated or from the Sheriff's revenue generated operating account, are expended in the year they are transferred to or co-mingled with the Block Grant account, and not when they are expended by the Block Grant account for the purposes of KRS 134.310.

The Boyd County Sheriff transferred \$49,000 in donated funds in 1997 to the Block Grant account which were then expended in 1998 to upgrade the lights and radios in all the cruisers. These funds were ordered by the Trial Court to be refunded by the Sheriff to the Fiscal Court, despite the fact that in 1997 the funds had already been expended by being transferred to the ownership of Fiscal Court via the transfer to the Block Grant account. This accounts for almost half of the funds ordered by the Trial Court to be refunded by the Sheriff to the Fiscal Court.

Whether the Grant was funded using donated funds or revenue generated funds, the accounting result would be the same: The funds would go "off the Sheriff's books" in the fiscal year they were transferred to the Fiscal Court owned Block Grant. Depending on the timing of the award of the Grant, the Sheriff could transfer funds from three separate fiscal years to the Grant account to be utilized for expensive items not otherwise able to be purchased in any single fiscal year.

The Circuit Court's order to the Boyd County Sheriff to pay these sums already transferred to the Block Grant in 1997 to the Boyd Fiscal Court was not supported by the evidence or the terms of the Grant, and there remained material issues of fact in contention.

**D. THE FISCAL COURT'S OWN RECORDS  
SHOW IT NEVER CAPPED THE SHERIFF'S BUDGET FOR 1999**

KRS 64.530 requires that the Fiscal Court take affirmative action if it wished to cap a Sheriff's budget. Despite the Sheriff's **estimated** budget being merely "accepted" by the Fiscal Court in 1999, it now contends it placed a budget cap on the Sheriff. The Trial Court ordered the Sheriff to surrender to the Fiscal Court the amount which the Fiscal Court claimed the Sheriff exceeded his budget in 1999.

KRS 64.530 requires affirmative action by the Fiscal Court to set the maximum amount that a sheriff may expend for his office: ". . . The fiscal court **may** also fix the maximum amount that the officer may expend each year for expenses of his office. ..." [emphasis added] The Court in Funk v. Milliken, 317, S.W.2d 499, 507 (Ky. 1958) directly addressed this provision: "KRS 64.530 provides that the fiscal court has authority, as to a fee officer, to fix 'the maximum amount that the officer

may expend each year for expenses of his office.’ “ The Court went on to state:

We think it means that the fiscal court **may** fix, *in advance*, the categories of reasonable official expenses that will be allowed and the maximum amount that will be allowed for each category. . . . It would be desirable for all fiscal courts to exercise the authority given by KRS 64.530, and limit the expenses in advance, or even require that each individual expenditure be approved in advance. **However it is our opinion that the statute does not require this to be done, and where it has not been done the officer yet may receive credit for proper expenses.** But in order to receive credit he must not only show the amount and purpose of each expenditure, and that it is reasonable, but must establish that the expenditure is in an allowable category. **[emphasis added]**

In January 1999, the Boyd County Sheriff, at the request of the Fiscal Court, submitted to the Fiscal Court an estimated budget of \$1,172,413.96, (Transcript “Table of Exhibits Def.”, Exhibit 12) which was *accepted* at the January 19, 1999 meeting of the Boyd Fiscal Court, however the Fiscal Court’s own minutes show that they did not affirmatively fix the maximum amount that the Sheriff could expend for that year. (Transcript “Table of Exhibits Def.” Exhibit 13).

The Fiscal Court, at its December 11, 1999 meeting, raised the budget cap on deputies’ salaries by \$36,653.62. (Transcript “Table of Exhibits Def”, Exhibit 14) This made \$1,209,067.58 the total amount of “accepted” funds available for expenditure. The accepted Audit of the Sheriff’s expenditures for 1999 showed gross disbursements of only \$1,163,327.00. (Transcript “Table of Exhibits Def.”, Exhibit 16) The Sheriff spent \$45,740.58 LESS than the “accepted” amounts reflected in the Fiscal Court’s own minutes.

In addition, the Sheriff surrendered over \$75,000.00 in excess fees for 1999 to the Fiscal Court. (Transcript "Table of Exhibits Def.", Exhibit 16) Even resolving **every** possible doubt in favor of the Fiscal Court, the Sheriff would have had to expend over \$45,740.58 from donated funds in 1999 to have ANY refund possibly due the Fiscal Court for the sheriff "overspending" the budget. Donated funds expenditures were less than half the Sheriff's unused budgetary amount in 1999.

The Fiscal Court now argues additional matters that are not in the record. It had every opportunity to make a record before it filed for summary judgment. It is too late to begin arguing additional matters at the Supreme Court level.

The facts simply do not support the Circuit Court's ruling on the issue of any refund due from the Sheriff in 1999, and summary judgment was inappropriate, as there are material facts in contention.

**E. SUMMARY JUDGMENT WAS NOT APPROPRIATE  
AS A MATTER OF LAW**

Summary Judgment under Kentucky Rule of Civil Rule 56 by the Circuit Court is not appropriate when there are material issues of fact in contention which directly effect the outcome of the case as defined in Paintsville Hospital v. Rose, 683 S.W.2d 255 (Ky. 1985) and Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).

Time and time again, this Court has provided appropriate guidance on the issue of when summary judgment should be granted, and when it should not be granted:<sup>14</sup>

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<sup>14</sup>Cited also in Ward v. Housman, 809 S.W.2d 717, 719 (Ky. App. 1991)

The proper function for a summary judgment in a case of this nature "is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." It is only proper where the movant shows that the adverse party could not prevail under any circumstances. **Summary judgment is premature and should not be granted, "although the facts and evidence thus far developed do not establish the existence of a genuine issue of material fact, [where] neither do they establish the non-existence of such an issue."** In short, it is not a substitute for trial, nor is it the functional equivalent of a motion for directed verdict. [numerous citations omitted] [emphasis added]. Paintsville Hosp. Co. v. Rose, supra at 256.

Summary judgment is "inappropriate if there is a dispute as to conclusions to be drawn from the facts of the case". Com. v. Thomas Heavy Hauling, Inc., 889 S.W. 2d 807, 808 (Ky. 1994), citing both Paintsville Hospital v. Rose, supra, and Steelvest, Inc. v. Scansteel Service Center, Inc., supra. This Court further clarified its stand on the use of summary judgment in Williams v. City of Hillview, 831 S.W.2d 181,183 (Ky. 1992):

In a motion for summary judgment, the movant must convince the court of evidence in the record of the nonexistence of an issue of material fact. **The movant for summary judgment should not succeed unless the right to judgment is shown with such clarity that there is no room left for controversy and it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor.** Summary judgment is to be used very cautiously and is not a substitute for trial, nor can it be used to deny the right of litigants to trial if they have a viable issue merely for the sake of expediency or efficiency. [Emphasis added]

Summary Judgment is "only proper where the movant shows that the adverse party could not prevail under any circumstances". Paintsville Hosp. Co. v. Rose, supra at 256. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."

Steelvest, supra at 480.

With no discovery beyond the Sheriff supplying his business records, no testimony concerning the Fiscal Courts review of those records except by the Fiscal Court's attorney and material issues of fact in contention, summary judgment was improper.

**CONCLUSION**

For all of the foregoing reasons, the judgment entered by the Court of Appeals should be affirmed since the Sheriff was allowed by KRS 61.310 to accept donations and was further not required to surrender any donations held at the end of the fiscal year under KRS 134.310, as donations were not income to his office; or in the alternative, the case should be sent back to the Boyd Circuit Court as summary judgment against the Sheriff under Civil Rule 56 was inappropriate.

Respectfully submitted,

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