

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

FILED
JUN 21 2006
CLERK
SUPREME COURT

BOYD FISCAL COURT

**MOVANT/
CROSS-RESPONDENT**

VS.

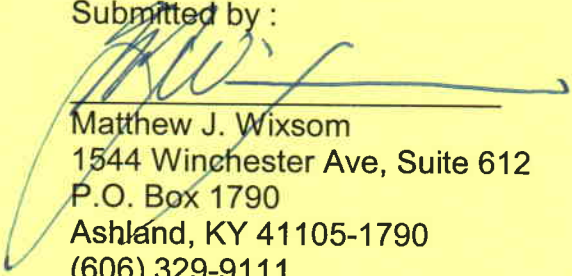
**PHILIP STURGILL, individually and as
Sheriff of Boyd County, Kentucky, and
FIDELITY & DEPOSIT OF MARYLAND**

**RESPONDENTS/
CROSS-MOVANTS**

Boyd Circuit Court
Action No. 01-CI-00643

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

Submitted by :


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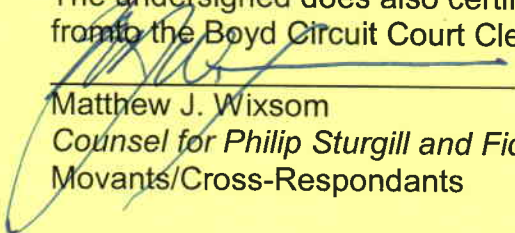
CERTIFICATE REQUIRED BY CR 76.12(6)

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 June 20, 2006 to:

Hon. Nelson T. Sparks
P.O. Box 8
Louisa, KY 41230
Attorney for Boyd Fiscal Court

Clerk, Kentucky Court of Appeals
360 Democrat Drive
Frankfort, KY 40601

The undersigned does also certify that the record on appeal was not withdrawn from the Boyd Circuit Court Clerk.


Matthew J. Wixsom
Counsel for Philip Sturgill and Fidelity & Deposit of Maryland,
Movants/Cross-Respondants

PURPOSE

This is the Reply Brief of Philip Sturgill and Fidelity & Deposit of Maryland on the issue of the appropriateness of Summary Judgment by the Trial Court based solely on the analysis of the sheriff's documents by the attorney for the Boyd County Fiscal Court and without any discovery beyond the Sheriff providing copies of his records.

ARGUMENT

SUMMARY JUDGMENT BY THE TRIAL COURT WAS NOT APPROPRIATE

A: MATERIAL FACTS ARE IN CONTENTION

The Boyd Fiscal Court's entire argument that it is entitled to summary judgment is premised on its own attorney's interpretation of the records supplied by the Boyd County Sheriff. It has continued that argument to this Court.

The Special Judge of the Circuit Court accepted those arguments of the Fiscal Court's counsel despite the fact that 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.")

Billy Joe Ross, the prior County Judge Executive, stated in his affidavit that he was aware of the donations being given to the Sheriff's department. (Transcript "Table of Exhibits Def.", Exhibit 4)

The County Attorney stated in his affidavit that he was aware of the donations as well. (Transcript "Table of Exhibits Def.", Exhibit 6)

The current 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 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 accounting professional to review the Sheriff's records was the State Auditor, whose report is in the record.

The Fiscal Court has never taken the Sheriff's deposition about the invoices to find out why approximately \$24,000 worth of invoices no longer exist. The State Auditor's office did talk to the Sheriff as part of its audit, and found no evidence of wrongdoing.

The Fiscal Court took no evidence on how a Local Block Grant was to be administered or what happens to sheriff's office funds deposited into a Local Block Grant account.

The Fiscal Court attempts to imply some nefarious purpose to the Sheriff opening Local Block Grant accounts and donated funds accounts at local banks, when **all** of the accounts administered by the Sheriff's department are held in local banks. The donated funds, as well as the Block Grants, and money for "Bullet-proof" vests were all maintained in **separate** local bank accounts, as they were required to be.

The Fiscal Court never directly addressed the issue that if the donated funds were not available to be used because they were supposed to be

surrendered to the Fiscal Court, that there would have been sufficient excess money in the Sheriff's general operating account to have funded those purchases. All that would have happened is that the Fiscal Court would have had a reduction in the excess funds surrendered to them in that subsequent year.

The Fiscal Court should not be allowed to maintain its argument that the sheriff should have surrendered the money in one year, but not give him credit in the next for allowable purchases. If the donations are lumped in with the revenue generated funds, as "income", for the purpose of determining how much to surrender in one fiscal year, then, under KRS 134.310, the expenditures must be allowed, either from donations or regular operating funds, in the subsequent year. There is no contention that the money was spent for anything but equipment for the sheriff's office, and as such, an allowable expense under KRS 134.310.

The only **evidence** in the record is that submitted by the Sheriff in support of his position.

B: SUMMARY JUDGMENT IS APPROPRIATE ONLY IF THERE ARE NO MATERIAL FACTS IN CONTENTION

Summary Judgment under Kentucky Rule of Civil Rule 56 by the Circuit Court was not appropriate when there were material issues of fact in contention which directly effected 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).

"Summary Judgment is appropriate only if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. We

have held that to prevail, a movant must show that it appears impossible for the opposing party to succeed on its claim or defense.” T&M Jewelry v. Hicks, 189 S.W.3d 526, 528 (Ky. 2006) citing Steelvest, Inc. v. Scansteel Service Center, Inc., supra, and Paintsville Hospital v. Rose, supra. “A reviewing court must consider the record in the light most favorable to the party against whom the summary judgment was granted.” T&M Jewelry v. Hicks, supra., at 528.

Summary Judgment “is not a substitute for trial, nor is it the functional equivalent of a motion for directed verdict.” 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. “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.” Williams v. City of Hillview, 831 S.W.2d 181,183 (Ky. 1992)

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 by the Trial Court was improper.

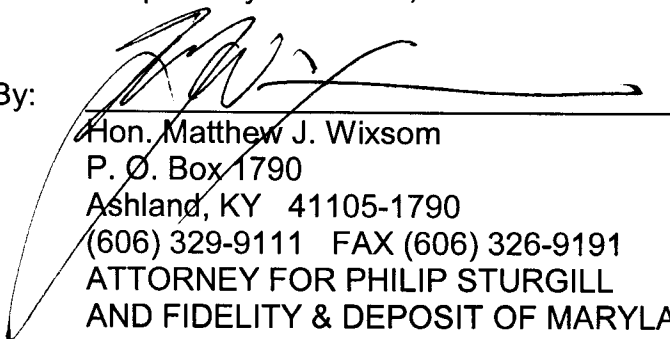
CONCLUSION

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.

In the alternative, the ruling of the Court of Appeals should be affirmed in part as the Sheriff was authorized to accept donations and not required to surrender any unspent monies at year end or that if monies were to be surrendered, the sheriff would be entitled to deduct any allowable expenditures from subsequent years. Also, in the alternative the case should be sent back to the Boyd Circuit Court for a determination as to what amounts, if any, are due and owing to the Boyd County Fiscal Court for any inadequately documented expenditures, as summary judgment against the Sheriff by the Trial Court under Civil Rule 56 was inappropriate.

Respectfully submitted,

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