COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2007-SC-000058

STEVEN L. BESHEAR and MARY E. LASSITER, in their official capacities

APPELLANTS/CROSS-APPELLEES

v.

HAYDON BRIDGE COMPANY, INC.; GREATER LOUISVILLE AUTO DEALERS ASSOCIATION; KENTUCKY AUTOMOBILE DEALERS ASSOCIATION; M&M CARTAGE CO., INC.; SPRINGFIELD LAUNDRY & DRY CLEANERS, INC. , USHER TRANSPORT, INC.

APPELLEES/CROSS-APPELLANTS

and

KENTUCKY WORKERS' COMPENSATION FUNDING COMMISSION

APPELLEE

DIRECT APPEAL FROM FRANKLIN CIRCUIT COURT (Hon. Wingate)
No. 03-CI-01547

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS HAYDON BRIDGE COMPANY, INC.; GREATER LOUISVILLE AUTO DEALERS ASSOCIATION; KENTUCKY AUTOMOBILE DEALERS ASSOCIATION; M&M CARTAGE CO., INC.; SPRINGFIELD LAUNDRY & DRY CLEANERS, INC.; AND USHER TRANSPORT, INC.

Respectfully submitted,

Mark D. Guilfoyle
Deters, Benzinger & LaVelle
207 Thomas More Parkway
Crestview Hills, KY 41017

Edward O'Daniel, Jr.
110 West Main Street
Springfield, KY 40069
Counsel for Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this Reply Brief was served via ordinary mail, postage prepaid, this 11th day of March, 2008, upon Hon. Thomas Wingate, Courthouse, 214 St. Clair St., Frankfort, KY 40601; Christopher W. Brooker, Esq., Wyatt, Tarrant & Combs, 500 West Jefferson Street, Suite 2800, Louisville, KY 40202; and Frank Dickerson, Esq., Kentucky Workers' Compensation Funding Commission, 42 Millcreek Park, P.O. Box 1128, Frankfort, KY 40602-1128. Counsel for Appellees/Cross-Appellants states that the record has not been checked out.

Mark D. Guilfoyle

STATEMENT OF POINTS AND AUTHORITIES

For their Reply Brief, Appellees/Cross-Appellants (collectively "Haydon Bridge" herein) state as follows. The parties' fundamental difference in this case boils down to whether the BRF constitutes a fund "in which public funds and private employee contributions are commingled, and cannot be differentiated." Haydon Bridge posits that the BRF constitutes a commingled ***trust*** that cannot be differentiated. Appellants/Cross-Appellees ("Appellants" herein) claim that the BRF is a commingled fund that can be retrospectively differentiated. Appellants' position is simply untenable.

In their Reply/Response Brief, Appellants' first volley in the dispute over differentiation is to proclaim boldly that "no Kentucky statute prohibits differentiation of the funds in the BRF." (Reply/Response at 14) However, KRS 342.1223(2)(a) does precisely that! This statute mandates that "[the KWCFC shall] [h]old, administer, invest, and reinvest the funds collected pursuant to KRS 342.122 and its other funds [together comprising the BRF] separate and apart from all "state funds" or "public funds," as defined in KRS Chapter 446. (KRS 342.1223(2)(a)). If ***all*** BRF funds -- including credits to the BRF from coal severance tax receipts -- must be held "separate and apart" from all public funds, how on earth could one be permitted to differentiate between "private" BRF funds and "public" BRF funds -- they are ***all*** private trust funds by operation of the quoted statute.[1]

Appellants go so far as to suggest that a statute exists expressly approving

[1] Nowhere do the Appellants address the import of KRS 342.1223(2)(b), which requires that all BRF funds be held by the KWCFC as a fiduciary.

transfers of "public monies" from the BRF to the General Fund:

> Contrary to Haydon Bridge's claim, Kentucky statutes contemplate and expressly approve transfers of public monies from the BRF to the General Fund:
>
> > The General Assembly may provide in a budget bill for the transfer to the general fund for the purpose of the general fund all or part of the agency funds, special funds, or other funds established under the provisions of KRS . . . 342.122.
>
> KRS 48.315. Therefore, Haydon Bridge misleads when it claims that there is a statutory bar to differentiation of funds in the BRF.

(Reply/Response at 14) It is Appellants who mislead. KRS 48.315 was repealed, in pertinent part, by *Armstrong*! The compiler's note to KRS 48.315 reads as follows:

> The transfer of money as authorized by Subsection (1) of this section [quoted above], from agencies in which public funds and private employee contributions are commingled and cannot be differentiated (KRS 16.565, 61.580, 78.650, 161.420, 342.122, and 342.480 (now repealed)), was declared unconstitutional in [*Armstrong*].

There is most certainly no express statutory authority to transfer ***any*** BRF funds to the General Fund.

In making the claim for differentiation, Appellants continue their misplaced reliance on Mary Lassiter's affidavit.[2] (Reply/Response at 13) That affidavit, however, demonstrates that while one may look back and ***account*** for

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[2] Appellants have no response to Haydon Bridge's citation to the *Cain* decision -- legal conclusions may not be properly included in an affidavit and, in any event, are not substantial evidence. (*See* Haydon Bridge Brief at 25) While the facts and figures in Lassiter's affidavit constitute uncontroverted substantial evidence, Lassiter's ***opinion*** that BRF funds can be differentiated is not.

all the coal severance tax receipts credited to the BRF, such an accounting does not amount to a "differentiation" of public and private funds under *Armstrong*. Indeed, Appellants do not even attempt to rebut Haydon Bridge's uncontested assertion that there is no recognized mechanism to track BRF Trust funds by source -- and that is what is needed to permit the differentiation of funds. Specifically, there has never been a directive (in a budget bill or otherwise) that details whether the $19M allotments are to be spent currently for authorized programs during the biennium, to be invested to pay for future liabilities, to be apportioned between current and future needs or in any other way differentiated from employer assessments and investment income. (*See* Haydon Bridge Brief at 23-24) Absent such direction, BRF funds just cannot be differentiated.

Appellants argue next that this Court rejected Haydon Bridge's logic in *Ross v. Gross*, 188 S.W.2d 475 (Ky. 1945). (Reply/Response at 14-15) *Ross* involved an attempt by the General Assembly to claim monies that had been paid into the state treasury by county officials, a portion of which were allocated to pay the officials' salaries. (*Id.* at 14) The *Ross* court ruled that commingling the funds in the state treasury did not convert the funds into "public money":

> [S]ince the money belonged to the appellees or the county, its payment into the state treasury did not vest the state with title thereto or a right to its custody. (188 S.W.2d at 477)

Ross, however, is completely inapposite as the "commingling" of the fees collected by county officials with other monies in the state treasury does not begin to approximate the commingling of funds in the BRF. Once coal severance tax receipts go into the BRF those monies "effectively vest [the KWCFC] with title thereto or a right to [their] custody." (*Id.*) Again, Appellants fail to acknowledge

KRS 342.1223(2)(b), which requires that the KWCFC hold BRF funds ***in trust***. Appellants fail to acknowledge KRS 342.1227 which makes clear that BRF funds may not be loaned to the Commonwealth, may not be subject to transfer to the Commonwealth and may not be expended for any other purpose than one authorized in Chapter 342. Finally, Appellants fail to acknowledge that annual credits of $19M to the BRF Trust are designated "statutorily dedicated receipts" under KRS 42.409(12)(a) and that statutorily dedicated receipts are not "available revenues" for other purposes. KRS 42.409(5). In short, Appellants' equating the BRF Trust to funds from which public officials' salaries are paid is like comparing a piggy bank to the vault at Fort Knox.

Finally, Appellants have no credible answer for Haydon Bridge's argument that *Armstrong* itself expressly declared that monies held by the various retirement systems fall within the category of commingled funds that cannot be differentiated. (709 S.W.2d at 446-47). It is uncontroverted that each and every one of the retirement systems enumerated in *Armstrong* holds monies that come from both public and private sources. And, while Appellants correctly note that "the ***source*** of the funding controls whether money can be transferred out of a special fund to meet other budgetary needs" (Reply/Response at 11), Appellants promptly contradict that tenet when making the quite bizarre argument that when the Commonwealth makes a contribution to an employee retirement system it makes a "private" contribution -- notwithstanding the fact that ***the source*** of such contribution is the General Fund! Appellants' specific argument is as follows:

> While the Commonwealth indeed contributes money to retirement funds it does so in its role as an

> ***employer***. Accordingly, in that particular instance, where the Commonwealth is fulfilling its contractual duty to fund its employees' retirement benefits, it makes what is deemed a "private" contribution. Where, however, the Commonwealth is appropriating general funds as a non-employer for "***public*** policy" reasons, the contribution is ***public*** in nature.

(Reply/Response at 16) (emphasis in original) Not surprisingly, there is no authority cited for this strained argument. To be sure, retirement contributions made by the Commonwealth through the appropriation of General Fund dollars are most certainly "public" contributions and, for the umpteenth time, the transfer of BRF funds in this case in no way constitutes the appropriation of "general funds." In sum, there is not a dime's worth of difference between the BRF and a retirement fund, ***and Armstrong declared retirement funds off limits to temporary suspensions under Section 51.***[3] *Armstrong* mandates that this Court declare BRF funds immune from transfer, too.

Beyond Appellants' tortured reasoning on the differentiation question, Appellants' Reply/Response Brief largely ignores Haydon Bridge's arguments. There are several glaring omissions in the Reply/Response Brief. First, in its Brief Haydon Bridge stated that "the threshold question presented in this case is whether an unconstitutional suspension of statues by the Governor -- an action that is void *ab initio* -- can be ratified by the General Assembly." (Haydon Bridge Brief at 19-20) In their Reply/Response Brief, Appellants never address this argument. Instead, they suggest that Haydon Bridge seeks to have this Court

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[3] Mary Lassiter could just as easily account for all of the Commonwealth's contributions to each of the retirement systems. Tracking those appropriations thusly, however, could not overcome the holding in *Armstrong* and permit the transfer of those "public" monies to the General Fund.

"revisit" its decision in *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005). To the contrary, Haydon Bridge seeks to have the *Fletcher* decision applied to this case.[4]

Fletcher made clear that some statutes mandate appropriations even in the absence of a budget bill, so-called "self-executing appropriations." (*Id.* at 865-66). Appellants flat out admit that "the appropriation at issue [in this case] may be "self-executing." (Reply/Response at 3)[5] Next, *Fletcher* makes clear that "the suspension of any statutes by the Governor's Public Service Continuation Plan was unconstitutional and invalid *ab initio*." 163 S.W.3d at 872. Likewise, in the case at bar, Governor Patton's suspensions of the credits to the BRF -- a self-executing appropriation -- was void *ab initio*. In the end, Appellants are completely unable to cite any authority that could possibly sanction the legislature's "ratifying" unconstitutional acts of the Governor.[6]

Second, Appellants completely ignore the crux of Haydon Bridge's Section 180 argument. The ***sole purpose*** of the first $19M in coal severance tax

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[4] Relief was not granted in *Fletcher* because the Fletcher petitioners did not "presently seek remedial relief" and admitted that the issues were resolved during the 2004 extraordinary session of the General Assembly. (163 S.W.3d at 872.) Haydon Bridge in this case ***does seek relief***, and the issues contested in the case at bar were not resolved by the General Assembly. In short, the parties agree that there is no need for this Court to "revisit" *Fletcher*; the taxpayers in this case are now entitled to the remedies framed under the *Fletcher* decision.

[5] Nevertheless, in their Reply/Response, Appellants persist in inaccurately describing the credits to the BRF Trust as coming from the General Fund. For example, the statement is made that "the General Assembly appropriated some of the general funds generated by the tax to the BRF." (Reply/Response at 2) Appellants make this glaring mistake repeatedly.

[6] Again, it was Appellants who posited that the 2002-2004 Biennium Budget Bill "ratified and codified the Governor's Plan." (Appellants' Initial Brief at 5-6)

receipts is to fund the BRF. While the BRF is not mentioned as one of the three purposes to which coal severance tax receipts may be devoted under KRS 143.090, the 1996 passage of KRS 342.122(1)(c) constituted a self-executing "direct appropriation" of the first $19M to the BRF.[7] Judge Graham himself recognized in his Opinion and Order that "the legislature could have created a scheme whereby the coal tax severance revenue [sic] was a direct appropriation into the BRF." (Opinion and Order at 3) The legislature did so! This argument was made front and center in Haydon Bridge's initial Brief (p. 6), and Appellants simply ignore the argument. In sum, there is no prohibition in Section 180 of the Constitution against the legislature making a direct appropriation of some or all of tax monies to a purpose other than those set forth in the original tax enactment. That is precisely what happened in this case, and the legislature having made such a direct appropriation, Section 180 mandates that when the first $19M in tax is "levied and collected" for the BRF, that $19M may not be "devoted to another purpose."

Third, Appellants completely ignore Haydon Bridge's germaneness argument, which is set forth in Section III of Haydon Bridge's Brief (pp. 25-28). In their Reply/Response Brief, Appellants state only that "Sections III and V of Haydon Bridge's brief appear to be wholly premised on Section 51's 'title' requirement." (*Id.* at 4) In fact, the germaneness argument is premised on the clear teaching in *Armstrong* that the power to suspend laws in a budget bill is confined to suspending laws that have "financial implication" or that "relat[e] to

[7] Thus, if only $17M in a given year is collected in coal severance tax, all of it must go directly to the BRF and none of it may be expended for ***any*** of the three original purposes set forth in the original coal severance tax enactment.

the appropriation of public funds." (709 S.W.2d at 443 and 446) In this Court's 2005 decision in *Board of Education v. Casey*, the Court said it this way:

> [In *Armstrong*] we held that the General Assembly could in its biennial budget bill suspend or modify existing statutes if the suspensions or modifications were germane to the broad subject of appropriations. . . . (157 S.W.3d at 208-9)

Appellants do not even attempt to address the *Casey* decision. In the case at bar, each annual cancellation of the $19M annual credits to the BRF Trust: (1) increases the liability of Kentucky employers to pay the Special Fund debt, (2) amends KRS 342.122(1)(b) setting the Special Fund assessment rate, (3) overrides the legislative finding of KRS 342.1241 that black lung costs "have placed a substantial financial burden on all employers of the Commonwealth" through the Special Fund assessments previously imposed on all employers, and (4) redirects the allocations of severance tax revenues under KRS 42.4582 and KRS 42.4585, which require that the credits to the BRF are to be made "off the top". ***None of these workers' compensation laws are germane to the broad subject of appropriations***. Accordingly, under *Armstrong and Casey*, the General Assembly is prohibited from suspending or modifying such laws in the Budget Bill.[8]

Finally, Appellants do not seriously dispute that the suspension of KRS 342.122 necessitated an increase in employers' workers compensation

[8] Some smart people in the legislature know that it takes a stand alone bill to properly effect the legislative changes that the General Assembly sought to effect in this case with a few words in the Budget Bill. HB 273 (copy attached as Appendix A) has been introduced in the current legislative session. The Court can see that this bill not only eliminates the $19M credit to the BRF; it also amends all the relevant laws as shown on Appendix A to Haydon Bridge's initial Brief. Perhaps because HB 273 calls for a tax increase on Kentucky employers, it has languished in House A&R.

assessment rates.[9] In a remarkable case of understatement, Appellants now allow as how they "concede that the suspension of the $19M appropriation likely had an effect on the assessment rates in 2003 and 2004." (Reply/Response at 18) It seems quite obvious that the legislature recognized that it could not just take $19M per year ***out of an actuarially balanced fund*** that has a specific amortization horizon viz., year 2018, without somehow replacing those monies. The *Thompson* opinion made this connection as a matter of law in regards to the Special Fund. *Thompson v. KRA*, 710 S.W.2d 854, 857 (Ky. 1986) (*see also* Haydon Bridge Brief at 30-33) Similarly, Judge Graham made this connection as a matter of law in the case at bar ("common sense compels" that conclusion). (Opinion and Order at 7) The surreptitious increase in assessments is a clear violation of Section 51.

Appellants are left to equate, once again, public employees having to forego raises with Kentucky employers shouldering an increase in assessment rates:

> In *Armstrong*, teachers and state employees felt the pain of not receiving their statutorily-mandated

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[9] This argument was contained in Section V of Haydon Bridge's initial Brief (pp. 31-37) Again, Appellants contend that this argument -- and Haydon Bridge's argument in Section III of its Brief -- "appear to be wholly premised on Section 51's 'title' requirement." (Reply/Response at 4) Just as Section III of Haydon Bridge's Initial Brief is premised on germaneness, not Section 51's title requirement, Section V of Haydon Bridge's Initial Brief is not wholly premised on the title requirement. Nor did Haydon Bridge waive any argument based on the title requirement by failing to make the argument in the trial court. In the case relied upon by Appellants, *Fischer v. Fischer*, 197 S.W.3d 98 (Ky. 2006), this Court made clear that "[i]f summary judgment is sustainable on any basis, it must be affirmed." *Id.* at 103. Moreover, in *Massie v. Persson*, 729 S.W.2d 448 (Ky. App. 1987), the Kentucky Court of Appeals made clear that an unconstitutional act of the General Assembly or the Governor is "void *ab initio* and, therefore, cannot be given life by waiver." *Id.* at 453.

> raises. . . . Here, Kentucky's employers likely felt the pain of marginally higher workers' compensation assessment rates.

(Reply/Response at 18) The difference, according to *Armstrong*, is not "the pain." The difference is the Constitution. *Armstrong* makes clear that state salaries are adjustable when "the shaky financial condition" of the state demands. (709 S.W.2d at 445). Raiding the BRF Trust to the tune of $19M while simultaneously increasing employer assessments by a like amount just will not fly under *Armstrong*.[10]

In conclusion, Appellants want to focus only on the fact that the suspensions in the Budget Bill were limited to the biennial period. Haydon Bridge readily acknowledges that fact, but that is not the end of the analysis. Indeed, Appellants readily acknowledge that "[a] temporary change in a statute may indeed have a 'permanent effect' . . . ." (Reply/Response at 8) This case is all about the effect the temporary suspensions had on other laws not mentioned in the Budget Bill. Because the temporary suspensions in this case permanently altered the entire statutory framework related to the Special Fund, they must fail.

Respectfully submitted,

Mark D. Guilfoyle

Edward O'Daniel, Jr.

[10] And this violation may well rest predominantly with Section 51's title requirement. Nowhere do Appellants dispute that House Bill 269 marked the first time in modern history -- perhaps ever -- that the legislature combined appropriations and revenue measures in the same bill.