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NELSON COUNTY BOARD OF EDUCATION

APPELLANT

v.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2008-CA-001958-MR
NELSON CIRCUIT COURT NO. 08-CI-00625

GENE A. FORTE, Individually and as
Administrator of the Estate of Carole Forte; and
KENTUCKY BOARD OF CLAIMS

APPELLEES

** ** ** ** **


BRIEF FOR APPELLANT

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Certificate of Service

The undersigned does hereby certify that copies of this brief were served upon the following individuals by regular U.S. Mail, postage prepaid, on June 11, 2010: Hon. Charles C. Simms III, Judge, Nelson Circuit Court, Nelson County Justice Center, 200 Nelson County Plaza, Bardstown, KY 40004-2100; Larry D. Raikes, Esq., Fulton, Hubbard & Hubbard, 117 East Stephen Foster Ave., P.O. Box 88, Bardstown, KY 40004-0088; G. Mitchell Mattingly, Esq., Kentucky Board of Claims, 130 Brighton Park Blvd., Frankfort, KY 40601; Clerk of Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601-9229.



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Introduction

This Court granted discretionary review of the decision of the Court of Appeals in a case originating in the Kentucky Board of Claims, and in which the Board of Claims dismissed the claim as untimely under the applicable statute of limitations.

Statement Concerning Oral Argument

Appellant requests oral argument because this case presents unique constitutional and separation of powers issues and matters of first impression before this Court, and oral argument may benefit the Court in deciding those issues.

Note Concerning Citations to the Record

Throughout this brief, references to the circuit court clerk's written record are made (ROA p.). References to video recordings of proceedings in the circuit court are made as required by CR 98(4)(a). References to the record of the Board of Claims are made (BC p.). References to the appendix of this brief are made (Appx.).

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Statement of the Case

Carole Forte, a teacher at Cox's Creek Elementary School in Nelson County, Kentucky, died on May 19, 2006. (BC p. 4.) She died from multiple blunt-force injuries sustained in a one-car motor vehicle accident. (BC p. 7.) The accident occurred as she was leaving school grounds, when an unsecured pole gate regulating traffic at an entrance/exit to the school was blown by the wind into her car and struck her in the head. (BC p. 4.)

On June 20, 2006, the Nelson District Court appointed Mrs. Forte's husband, Gene A. Forte, to act as the administrator of her estate. (BC p. 6.) Mr. Forte first filed a tort action in the Nelson Circuit Court, case number 07-CI-00164, against the Nelson County Board of Education, who was Mrs. Forte's employer. (BC p. 2.) The complaint filed in the tort action alleged negligence on the part of the Board of Education in the installation, testing, inspection, and operation of the pole gate that had caused Mrs. Forte's death. (BC p. 2.)¹

After commencement of the civil tort action in the Nelson Circuit Court, Mr. Forte also filed a claim in the Kentucky Board of Claims on April 23, 2008, which alleged negligence on the part of the Board of Education in the design, assembly, testing, inspection, and operation of the pole gate at issue. (BC p. 4.) Mr. Forte

¹ The Nelson Circuit Court granted the Board of Education's motion for summary judgment in the tort case on August 7, 2009, on governmental immunity grounds. (See Board of Education's motion for leave to file additional papers filed in the Court of Appeals in this action.) Mr. Forte appealed that judgment to the Court of Appeals, which dismissed the appeal due to his failure to name an indispensable party in his notice of appeal. Mr. Forte has sought discretionary review of that decision of the Court of Appeals. (See Mr. Forte's motion for discretionary review filed in case no. 2010-SC-000149-D.)

sought an award of \$200,000.00 from the Board of Claims for the wrongful death of Mrs. Forte, and an additional \$200,000.00 for his loss of consortium. (BC p. 4.) At the same time he filed his claim, Mr. Forte also filed a motion in the Board of Claims to hold his claim in abeyance. (BC p. 2.) His motion alleged that, "If it is ultimately determined in the tort civil action in Nelson Circuit Court that the Forte claims are barred by immunity and/or KRS 342.700, a cause of action before this Board would then accrue. However, if it is determined that the tort action is not so barred, the Forte claims would continue through that action, with no cause of action accruing before the Board." (BC p. 2.) His motion further claimed that he was only filing the claim in the Board of Claims "in order to avoid the lapse of the two (2) year statute of limitations period set forth in KRS 44.110(3)." (BC pp. 2-3.)

The Board of Education responded to Mr. Forte's claim on May 20, 2008. (BC p. 11.) Contemporaneously with filing its answer to the claim, the Board of Education also filed a response to Mr. Forte's motion to hold the claim in abeyance, a motion for the Board of Claims to determine whether it had jurisdiction over Mr. Forte's claim, and a motion to dismiss the claim as untimely filed. (BC p. 16.) Mr. Forte then filed a response to the Board of Education's motion to dismiss the claim (BC p. 23), and the Board of Education filed a reply brief (BC p. 26).

After the parties had completed their briefing of the issues raised in the Board of Education's motion to dismiss, the Board of Claims entered its final order on

June 19, 2008. (BC p. 31; Appx. 3.) The final order denied Mr. Forte's motion to hold his claim in abeyance, and it granted the Board of Education's motion to dismiss "for the reason that the claim was not filed within one (1) year from the time the claim for relief accrued, pursuant to KRS 44.110(1)." (BC p. 31; Appx. 3.)

Mr. Forte commenced an action in the Nelson Circuit Court for review of the final order of the Board of Claims on August 1, 2008. (ROA p. 2.) His complaint stated that the sole "APPEAL ISSUE" was "Whether the Board of Claims acted outside its powers." (ROA p. 2.) Mr. Forte further described the manner in which the Board of Claims acted outside its powers as "the Appellee Board of Claims did not have subject matter or personal jurisdiction to allow for dismissal of [Mr. Forte's] claim." (ROA p. 2.) One week later, prior to the Board of Education's answer being filed, Mr. Forte filed a "supplemental memorandum" with the circuit court, which stated for the first time his position that the statute of limitations applicable to Mr. Forte's claim in the Board of Claims should be tolled by operation of the "savings statute," KRS 413.270. (ROA p. 12.) He argued, "If the tort action should ultimately be dismissed for lack of jurisdiction, [Mr. Forte] could rely upon KRS 413.270 and proceed with his action in the Board of Claims." (ROA p. 12.)

The Board of Education filed its answer to Mr. Forte's complaint on August 13, 2008. (ROA p. 14.) It also filed a response to Mr. Forte's supplemental memorandum at the same time. (ROA p. 28.) Following the filing of all the pleadings and memoranda, the circuit court ordered counsel for the parties to

appear at motion hour, in order to allow the court to determine "whether this action is ready to be submitted to the Court." (ROA p. 37.) Mr. Forte's counsel at that time advised the court that both Mr. Forte and the Board of Education had fully briefed the issues and that the case was ready for the circuit court to render a decision on the appeal. (VR No. 1: 10/1/08; 10:08:36.) The circuit court took Mr. Forte's appeal under submission at that time. (VR No. 1: 10/1/08; 10:08:47.)

The circuit court rendered its judgment on October 15, 2008, in the form of an opinion vacating and remanding the decision of the Board of Claims. (ROA p. 40; Appx. 2.) The circuit court's opinion noted "that Mr. Forte's action before the Kentucky Board of Claims is presently barred by KRS 44.110(1)." (ROA p. 41; Appx. 2 p. 2.) "However, if Mr. Forte's action in the Nelson Circuit Court is dismissed because said court lacked jurisdiction due to the sovereign immunity defense, it appears that Mr. Forte may have ninety (90) days to re-file said action in the appropriate forum - Kentucky Board of Claims." (ROA p. 41; Appx. 2 p. 2.) The circuit court vacated the decision of the Board of Claims, with directions for that tribunal to "make findings on the motion to hold in abeyance and to address the recent [decision in *Commonwealth, Univ. of Ky. Hosp. v. Douglas*, 2007-CA-000647-MR (Ky. App. Jul. 18, 2008)] as it relates to KRS 44.110." (ROA p. 42; Appx. 2 p. 3.) The Board of Education filed its notice of appeal on the following day. (ROA p. 60.)

On October 9, 2009, the Court of Appeals rendered its opinion and designated it "To Be Published." (Appx. 1 p. 1.) The Court of Appeals concurred with the

circuit court and the Board of Education in finding that, “[a]t first glance, [Mr. Forte’s] action would appear to be untimely filed under the statute of limitations contained in KRS 44.110(1).” (Appx. 1 p. 4.) However, the Court of Appeals affirmed the circuit court, holding that KRS 413.270(1) applies to actions filed in the Board of Claims (Appx. 1 p. 6), and that because a dismissal with prejudice by the Board of Claims would prevent re-filing this action in that tribunal in the event the dismissal of the tort action is upheld on appeal, “the Board of Claims should reconsider its dismissal in light of the tolling provision of KRS 413.270(1)” (Appx. 1 p. 7). This Court granted discretionary review on April 14, 2010.

Argument

I. Standard of review

When reviewing a final order of the Board of Claims, the circuit court must review the case upon the record and is limited to determining whether (1) the Board of Claims acted without or in excess of its powers; (2) the award was procured by fraud; (3) the award was not in conformity to the provisions of KRS 44.070 to 44.160; and (4) the findings of fact supported the award. *Commonwealth, Dept. of Highways v. William D. Rommel Constr. Co.*, 343 S.W.2d 834, 835 (Ky. 1961) (citing KRS 44.140(5)). So long as the factual findings of the Board of Claims are supported by substantial evidence, and so long as its conclusions derived from them are not clearly erroneous, they are binding upon the circuit court reviewing the decision of the Board of Claims. *Commonwealth, Dept. of Parks v. Bergee Bros., Inc.*, 480 S.W.2d 158, 159 (Ky. 1972); *Department for Human Resources v. Redmon*, 599 S.W.2d 474, 476 (Ky. App. 1980). However, matters of statutory construction are subject to *de novo* review. *Parrish v. Kentucky Bd. of Medical Licensure*, 145 S.W.3d 401, 408 (Ky. App. 2004).

On appeal from the circuit court, “[t]he Court of Appeals shall review *only* the matters subject to review by the Circuit Court and also errors of law arising in the Circuit Court and made reviewable by the Rules of Civil Procedure, *where not in conflict with KRS 44.070 to 44.160.*” KRS 44.150 (emphasis added); *Rommel*, 343 S.W.2d at 835. Reviewing courts, including both the circuit court and the Court of Appeals, are not to substitute their judgment for that of the Board of Claims,

even if they may have reached a different conclusion. *Commonwealth, Dept. of Highways v. General & Excess Ins. Co.*, 355 S.W.2d 695, 699 (Ky. 1962).

II. The decisions of the Court of Appeals and circuit court conflict with Section 231 of the Kentucky Constitution because they undermine the General Assembly's exercise of its authority to prescribe rules for adjudicating claims against state agencies.

The only issue that Mr. Forte raised in the complaint he filed in the circuit court for review of the final order of the Board of Claims was the issue of "[w]hether the Board of Claims acted outside its powers." (ROA p. 2.) More specifically, Mr. Forte argued before the circuit court that the "Board of Claims did not have subject matter or personal jurisdiction to allow for dismissal of [Mr. Forte's] claim." (*Id.*) The Board of Education argued before the Board of Claims that it did, in fact, have jurisdiction over Mr. Forte's claim (BC pp. 16-20), filed an answer to Mr. Forte's complaint in the circuit court that argued in favor of the Board of Claims's exercise of jurisdiction (ROA pp. 14-27), and again argued in favor of the Board of Claims's jurisdiction before the Court of Appeals (Brief for Appellant in Court of Appeals pp. 6-14). The decisions of the Court of Appeals and the circuit court on this issue violate the doctrine of separation of powers under the Kentucky Constitution, Section 231.

A. The General Assembly has plenary authority under Section 231 of the Kentucky Constitution to prescribe rules for adjudicating claims against state agencies.

Under this Commonwealth's present constitution, "[t]he General Assembly may, by law, direct in what manner and in what courts suits may be brought

against the Commonwealth." Ky. Const. § 231. This text means that, absent specific authorization from the General Assembly, the Commonwealth "can not be made a party defendant, and is not suable in her own courts." *Divine v. Harvie*, 23 Ky. (7 T.B. Mon.) 439, 441, 1828 WL 1295, *2 (1828).

When the text that now is enshrined in Section 231 of the Constitution was being debated in the constitutional convention on March 13, 1891, the delegates adopted permissive ("may"), not mandatory ("shall"), language. Thus, the legislature has the option to permit suits against the Commonwealth, but it may choose not to allow them. The delegates were persuaded on that point by the floor statement of Delegate William Goebel of Covington, who argued, "It is a matter of sovereignty that the State shall not be sued, except by its consent - a matter of discretion in the Legislative Department of every Government." *Debates*² at 4701. No delegate rose to speak in opposition to Goebel's comments.³ When the convention approved the constitutional language to submit to the voters for their ratification in the spring of 1891, *id.*, and again when they approved stylistic changes to the Constitution's text that fall, *id.* at 5977, 6048, the text was not changed. Thus, by employing permissive language, the constitutional convention made clear that authorizing suits against the Commonwealth is purely an act of legislative grace.

² *Official Report of the Proceedings and Debates in the Convention Assembled at Frankfort on the Eighth Day of September, 1890, to Adopt, Amend or Change the Constitution of the State of Kentucky.*

³ The remainder of the brief floor debate on this section of the Constitution concerned whether the General Assembly could rightfully refuse to authorize suits by foreigners for payment on unauthorized state bonds. *Debates* at 4700-01.

Section 231 of the Constitution "delegat[es] to the General Assembly the authority to waive the Commonwealth's inherent immunity ... by specifying where and in what manner the Commonwealth may be sued. Of course, the most significant waiver of immunity to date was the enactment of the Board of Claims Act by the 1946 General Assembly and its substantial amendment to its present-day form by the 1950 General Assembly." *Reyes v. Hardin County*, 55 S.W.3d 337, 339 (Ky. 2001). The Board of Claims Act, KRS Chapter 44, is a limited waiver of the defense of sovereign (or governmental) immunity. *University of Ky. v. Guynn*, 372 S.W.2d 414, 416 (Ky. 1963). Because authorization to sue the Commonwealth is purely an act of legislative grace, the right of a litigant to prosecute a claim against any immune entity in the Board of Claims "may be granted, withdrawn or restricted at the will of the legislature." *Guynn*, 372 S.W.2d at 416. The General Assembly is not obligated to provide to a Board of Claims litigant all the procedural rights normally afforded litigants in the Court of Justice. *See Moore v. Kentucky State Penitentiary*, 789 S.W.2d 788, 789-90 (Ky. App. 1990) (no constitutional right to an appeal in cases originating in the Board of Claims). Strict compliance with KRS Chapter 44 is "a condition precedent to bringing an action and it must be complied with or the action is barred by sovereign immunity." *Commonwealth, Transp. Cabinet v. Abner*, 810 S.W.2d 504, 504 (Ky. 1991).

Section 231 vests in the General Assembly the exclusive authority to direct "in what manner" persons injured by the negligence of the Commonwealth or its

agencies may seek redress. The Court of Justice is not free to substitute its preferences for those of the General Assembly in matters constitutionally delegated to the exclusive province of the legislature. *See* Ky. Const. §§ 27, 28. Compliance by the judicial branch with the procedures mandated by the General Assembly to govern Board of Claims cases is therefore a matter of constitutional imperative, in contrast with other kinds of cases initially brought in the courts, in which the judicial branch prescribes the rules of practice and procedure. *See* Ky. Const. § 116.

B. The General Assembly has entrusted to the Board of Claims the exclusive jurisdiction to determine when it has jurisdiction over a claim.

The Board of Claims properly denied Mr. Forte's motion to hold his claim in abeyance because the Board of Claims Act provides that it, and not the Nelson Circuit Court, had the responsibility to determine which tribunal had jurisdiction over Mr. Forte's claim. Neither the Board of Claims Act nor the common law supports Mr. Forte's position that the Board of Claims did not have jurisdiction to determine whether it had jurisdiction over his claim.

Generally, "a quasi-judicial agency ..., like a Court, has authority, by implication, to determine its own jurisdiction." *City of Greenup v. Public Service Com'n*, 182 S.W.3d 535, 538 (Ky. App. 2005). In the specific case of the Kentucky Board of Claims, the General Assembly has codified the general rule in the Board of Claims Act. "The Board of Claims shall have *primary and exclusive jurisdiction* to make findings of fact, conclusions of law, and legal

determinations with regard to whether the alleged negligent act was on the part of the Commonwealth or any of its cabinets, departments, bureaus, or agencies or any officers, agents, or employees thereof," KRS 44.073(3) (emphasis added), and whether such negligence was committed by one of its "officers, agents, or employees while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus, or agencies," KRS 44.073(4). Thus, the General Assembly has conferred upon the Board of Claims the exclusive jurisdiction to determine whether a claim against a state agency falls within its jurisdiction.

As a necessary and proper means of protecting the jurisdiction of the Board of Claims to determine when it has subject matter jurisdiction of a claim, the General Assembly has also provided that no claim for negligence against a state agency or its officers, agents, or employees "may be brought initially in any other court or forum in the Commonwealth except the Board of Claims until the Board of Claims makes a determination, that has become final, that the Board of Claims has or does not have primary and exclusive jurisdiction over the claim." KRS 44.073(5). Thus, the jurisdiction of the Board of Claims and that of the Nelson Circuit Court are mutually exclusive. Specifically, KRS 44.073(5) provides that no tort action may be commenced in the circuit court against a state agency unless and until the Board of Claims determines that it lacks jurisdiction. Of necessity, no action can proceed in both the Board of Claims and the circuit court at the same time. Where a claim is simultaneously pending

both in the Board of Claims and the circuit court, the General Assembly has mandated that the action not proceed in the circuit court unless and until the Board of Claims determines that it does *not* have jurisdiction.

Mr. Forte argued in both the Board of Claims and the circuit court that jurisdiction did not vest with the Board of Claims unless and until the Nelson Circuit Court entered an order in the tort action finding that the Board of Education was immune from suit and that the circuit court therefore had no jurisdiction over it. (*See* BC p. 2; ROA p. 3.) Both the circuit court (ROA p. 42; Appx. 2 p. 3) and the Court of Appeals (Appx. 1 p. 6) agreed. In essence, Mr. Forte and the courts below believe that the Board of Claims may only assume jurisdiction over his claim after the circuit court decides the jurisdictional issue, and that the circuit court's decision then binds the Board of Claims.

However, the position taken by Mr. Forte and the lower courts completely contradicts the text of KRS 44.073 and turns the statutory language upside down. That statute declares that, in cases involving potentially-immune state agencies, the jurisdiction of the Board of Claims to decide the jurisdictional issue is both "primary" and "exclusive." There is no statutory basis for the Board of Claims to have awaited the circuit court's decision on the jurisdictional issue in the tort action prior to addressing jurisdiction for itself. The Board of Claims therefore correctly denied Mr. Forte's motion to hold his claim in abeyance. Further, the Board of Claims correctly proceeded to

determine whether it, or the circuit court, had jurisdiction over Mr. Forte's claim.

It is for this reason that KRS 413.270 has no application to a claim initially filed in the circuit court and later re-filed in the Board of Claims. That statute provides in relevant part:

If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety (90) days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation.

KRS 413.270(1).

In its exercise of its authority under Section 231 of the Kentucky Constitution to prescribe "in what manner and in what courts suits may be brought against the Commonwealth," the General Assembly has directed that all suits against potentially-immune state agencies be filed in the Board of Claims. KRS 44.073(5). In order for KRS 413.270 to save a claim dismissed upon jurisdictional grounds and later re-filed in another tribunal, the action must first have been commenced "in due time and in good faith." KRS 413.270(1). A claim against a potentially-immune state agency,⁴ not initially filed in

⁴ Clearly, county boards of education are state agencies, and the application of the Board of Claims Act to them is not in doubt. *See, e.g., Grayson County Bd. of Ed. v. Casey*, 157 S.W.3d 201, 203 (Ky. 2005) ("The Board of Claims Act is a partial waiver of immunity that permits a person damaged by a board of education's negligent performance of a governmental function to file a claim for damages in the Board of Claims."). The Board of Education expresses no opinion as to whether a claim is filed in "good faith" in the circuit court against a state agency when it is not so

conformity with KRS 43.073(5), cannot be said to have been filed "in good faith." While, consistent with KRS 44.073(5), KRS 413.270(1) may permit a plaintiff to re-file his claim in the circuit court once the Board of Claims determines that it lacks jurisdiction, the opposite is not true.

The Court of Appeals determined that KRS 413.270(1) applies to cases in the Board of Claims because the Board of Claims meets the definition of a "court" as set out in KRS 413.270(2). (Appx. 1 pp. 5-6.) However, the Court of Appeals did not even mention KRS 44.073 in its opinion or consider how that statute affects the applicability of KRS 413.270.⁵ Just as the statute of limitations applicable to a claim against a state agency filed in the Board of Claims applies even when the claim is mistakenly filed in the circuit court, *Abner*, 810 S.W.2d at 504; *Wagoner v. Bradley*, 294 S.W.3d 467, 469 (Ky. App. 2009), so too, the statute defining which tribunal is empowered to determine the jurisdictional issue, KRS 44.073, applies in the circuit court.

By ordering the Board of Claims, in effect, to acquiesce in the jurisdictional determination made in the tort case by the Nelson Circuit Court, the circuit court and the Court of Appeals in this case misconstrued KRS 413.270, failed to follow the General Assembly's directives in KRS 44.073, and usurped the prerogative of the legislative branch to determine the proper "manner ... suits may be brought against the Commonwealth," Ky. Const. § 231. It was not error

clear that the Board of Claims Act applies.

⁵ Presumably, the proper application and interpretation of KRS 44.073 is one of the issues that the Court of Appeals felt was "either moot or without merit." (Appx. 1 p. 7.)

for the Board of Claims to deny Mr. Forte's motion to hold his claim in abeyance and decide whether it had jurisdiction over the claim.

C. Because the Board of Claims had primary and exclusive jurisdiction over Mr. Forte's claim, it did not exceed its powers by dismissing the claim with prejudice under the applicable statute of limitations.

The final order of the Board of Claims did not specifically recite that the Board of Claims had jurisdiction over Mr. Forte's claim. However, by reaching the merits of Mr. Forte's claim, the Board of Claims implicitly found that it did, in fact, have jurisdiction. The Board of Claims was correct.

The Board of Education is an arm of state government and is entitled to the protection from suit afforded by governmental immunity. *Yanero v. Davis*, 65 S.W.3d 510, 527 (Ky. 2001); *see also Williams v. Kentucky Dept. of Ed.*, 113 S.W.3d 145, 155 n. 4 (Ky. 2003) ("a local board of education is a state agency, thus falling squarely within the language of KRS 44.072 and KRS 44.073(2)"). As stated by this Court, "[t]he Board of Claims Act is a partial waiver of immunity that permits a person damaged by a board of education's negligent performance of a governmental function to file a claim for damages in the Board of Claims, including a claim premised upon vicarious liability for the torts of the board of education's employees." *Grayson County Bd. of Ed. v. Casey*, 157 S.W.3d 201, 203 (Ky. 2005). The Board of Claims has exclusive subject matter jurisdiction over claims for damages against otherwise-immune state agencies, including the Board of Education. KRS 44.072. Thus, the Board of Education is immune

from suit in the circuit court tort action, and the Board of Claims therefore had jurisdiction over Mr. Forte's claim, unless the alleged wrongful conduct by the Board of Education was a proprietary function, as opposed to a governmental function. *Casey*, 157 S.W.3d at 203.

A government agency performs a governmental function when it carries out a function integral to state government; a proprietary function is a business of a sort theretofore engaged in by private persons or corporations for profit.

Schwindel v. Meade County, 113 S.W.3d 159, 168 (Ky. 2003). The control and management of public school property is integral to the Board of Education's function of promoting education. Designing, assembling, testing, inspecting, and operating a gate, as a way of regulating the speed and flow of vehicular and pedestrian traffic on school property, is clearly a means of promoting the safety and welfare of the school's pupils, teachers, and other employees. Thus, it is squarely within the heart of the Board of Education's purpose and mission.

In this case, the maintenance and use of the pole gate by the Board of Education on its property was not a "business" carried on for profit. The Board of Education's actions of designing, assembling, maintaining, operating, and using the gate on its property did not generate any income. Therefore, the Board of Education was performing a governmental function, not a proprietary function, and it is entitled to governmental immunity as to Mr. Forte's tort

claims. Therefore, the Board of Claims correctly found that it had jurisdiction over Mr. Forte's claim, to the exclusion of the circuit court.⁶

After implicitly holding that it had jurisdiction over Mr. Forte's claim, the Board of Claims dismissed Mr. Forte's claim "for the reason that the claim was not filed within one (1) year from the time the claim for relief accrued." (BC p. 31; Appx. 3.) The circuit court agreed with the Board of Claims, noting in its opinion that "Mr. Forte's action before the Kentucky Board of Claims is presently barred by KRS 44.110(1)." (ROA p. 41; Appx. 2.) This determination by the circuit court was not challenged by Mr. Forte by way of a cross-appeal to the Court of Appeals under CR 74.01, thus waiving the issue on appeal. *Smith v. Wal-Mart Stores, Inc.*, 6 S.W.3d 829, 830 (Ky. 1999). Further, the Court of Appeals concurred in the circuit court's assessment, finding that "[Mr. Forte's] action would appear to be untimely filed under the statute of limitations contained in KRS 44.110(1)." (Appx. 1 p. 4.) Mr. Forte did not file a cross-motion for discretionary review in this Court under CR 76.21. He therefore may not now argue that the circuit court or the Court of Appeals erred in its application of the statute of limitations, KRS 44.110, to this case. *Perry v. Williamson*, 824 S.W.2d 869, 871 (Ky. 1992).

⁶ The Nelson Circuit Court has found in the tort action that the Board of Education was engaged in a governmental function, and therefore entitled to governmental immunity. See Board of Education's motion for leave to file additional papers filed in the Court of Appeals in this action. The Board of Education concurs in the circuit court's analysis of this issue in the tort action, and adopts its analysis as if fully set forth herein.

The holding of the Board of Claims that Mr. Forte's claim was time-barred under KRS 44.110 may not now be disturbed by this Court. Because, as discussed, *supra*, KRS 413.270 does not save Mr. Forte's claim, this Court should reverse the decision of the Court of Appeals and reinstate the dismissal of Mr. Forte's claim by the Board of Claims under the statute of limitations.

III. Neither the circuit court nor the Court of Appeals should have considered the application of KRS 413.270 to this case because it was an issue not presented first to the Board of Claims.

Mr. Forte argued for the first time, in a supplemental memorandum filed in the circuit court, that notwithstanding KRS 44.110, KRS 413.270 prevented the Board of Claims from dismissing his claim. (ROA p. 12.) While noting that "Mr. Forte's action before the Kentucky Board of Claims is presently barred by KRS 41.110(1)," the circuit court based its decision to vacate and remand the final order of the Board of Claims, in part, upon its finding that "Mr. Forte may have ninety (90) days to re-file said action in the appropriate forum - Kentucky Board of Claims" due to the operation of KRS 413.270. (ROA p. 41; Appx. 2 p. 2.) The Board of Education preserved this issue for review by filing a written response to Mr. Forte's supplemental memorandum that opposed the circuit court's consideration of this argument (ROA p. 28), and then reiterated its position before the Court of Appeals (Brief for Appellant in Court of Appeals pp. 15-18). Even if KRS 413.270 applies to Board of Claims cases generally, neither the circuit court nor the Court of Appeals should have considered its application to this case because Mr. Forte did not present this issue first to the Board of Claims.

As a general rule, the failure to raise an issue before an administrative body precludes a person from asserting that issue in an action for judicial review of the agency's action. *Urella v. Kentucky Bd. of Medical Licensure*, 939 S.W.2d 869, 873 (Ky. 1997); *O'Dea v. Clark*, 883 S.W.2d 888, 892 (Ky. App. 1994); *Personnel Bd. v. Heck*, 725 S.W.2d 13, 17 (Ky. App. 1987). A person "cannot pursue one theory below and another on appellate review." *Urella*, 939 S.W.2d at 874; *Parrish*, 145 S.W.3d at 413. The Court of Appeals, in *Taxpayer's Action Group of Madison County v. Madison County Bd. of Elections*, 652 S.W.2d 666, 667-68 (Ky. App. 1983), first extended this rule, which had long been applied to both civil and criminal actions commenced in the trial courts, to administrative cases. See *Heck*, 725 S.W.2d at 17. In other words, an appellant "will not be permitted to feed one can of worms" to the Board of Claims and another to the circuit court in his action for review of the Board's decision. See *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976).

In addition to the common law rule that a trial court or administrative agency should have the first opportunity to pass on all of the claims and issues raised by the parties, the Court of Appeals explained in *Heck* that the language of the statute governing appeals of Personnel Board decisions also mandated its holding. *Heck*, 725 S.W.2d at 17. The statute that was in issue in *Heck*:

provides that no "new or additional evidence shall be introduced in the Franklin Circuit Court except as to fraud or misconduct affecting the outcome of the case ...," and that "the court shall otherwise hear the case upon the record...." An issue not raised before the Board would not be in

the record of the proceedings before the Board, and therefore would not be before the circuit court for review.

Id. (citing KRS 18A.100(5)). The Court of Appeals found persuasive "the rationale behind the requirement that the issue must be raised before the Board in each and every case, i.e., that a court or quasi-judicial body may not be found to be in error where it has not been given an opportunity to (1) rule on the issue or (2) correct any alleged error. Furthermore, it seems fundamentally unfair to allow an issue to be litigated on appeal where the opposing party had no opportunity to argue or brief the issue before the trial court or the administrative body acting in its judicial capacity." *Id.* at 18. This Court cited the holding of *Heck* with approval in *Urella*, 939 S.W.2d at 873.

Similarly, KRS 44.140(5), which governs Mr. Forte's action for judicial review of the decision of the Board of Claims that is at issue in this case, provides in relevant part:

On appeal [to the circuit court] no new evidence may be introduced, except as to fraud or misconduct of some person engaged in the hearing before the board. The court sitting without a jury shall hear the cause upon the record before it[.]

There is no meaningful difference between the relevant statutory text in *Heck* and the text of KRS 44.140(5). The same rule that governed the Court's decision in *Heck* should apply in this case.

Mr. Forte did not allege or present any evidence to the circuit court of any fraud or misconduct on the part of the Board of Education. Therefore, the circuit court was prevented by KRS 44.140(5) from considering any evidence

that was not first presented to the Board of Claims. Instead, the trial court was charged with deciding Mr. Forte's appeal "upon the record before it." Because Mr. Forte's argument concerning the effect of KRS 413.270 upon his claim was not first presented to the Board of Claims, that issue, in the words of *Heck*, "therefore [was] not [] before the circuit court for review." There was no statutory warrant for the circuit court to consider Mr. Forte's argument presented there for the first time. Accordingly, the Nelson Circuit Court erred by basing its decision, in part, upon the application of KRS 413.270 to Mr. Forte's claim.

The Court of Appeals compounded the error of the circuit court. It was prohibited from considering any matter not reviewable by the circuit court, except for any errors of law arising in the court below. KRS 44.150. In describing the standard of review it was to employ, the Court of Appeals cited KRS 44.150 for the proposition that its review "shall proceed 'under the same conditions and under the same practice as appeals [that] are taken from judgments in civil causes rendered by the Circuit Court[.]'" (Appx. 1 p. 4.) However, it omitted any mention of the second sentence of KRS 44.150, which further circumscribed its review: "The Court of Appeals shall review only the matters subject to review by the Circuit Court and also errors of law arising in the Circuit Court and made reviewable by the Rules of Civil Procedure, where not in conflict with [the Board of Claims Act]." Thus, the second sentence of

KRS 44.150 fetters the Court of Appeals to the same extent that KRS 44.140(5) constrains the circuit court's review of a Board of Claims decision.

Just as the General Assembly may, in its sole discretion, deny any appeal whatsoever from a Board of Claims decision, *Moore*, 789 S.W.2d at 789-90, it is also empowered under Section 231 of the Kentucky Constitution to restrict the scope of review available in the Court of Appeals. Under KRS 44.150, the Court of Appeals was confined to reviewing only those matters specified in KRS 44.140(5), which under *Heck* would not have included the application of KRS 413.270, plus any errors arising in the circuit court. By considering the application of KRS 413.270 to this case, the Court of Appeals exceeded the constitutionally-imposed limitations placed upon its review by the General Assembly in KRS 44.150 and ignored its own precedent in *Heck*. This Court should, therefore, reverse the decision of the Court of Appeals.

IV. KRS 413.270 does not grant more than one opportunity to litigate a claim before the tribunal with subject matter jurisdiction over the claim.

Even if KRS 413.270 applies to Board of Claims cases generally, and even if the circuit court and the Court of Appeals were correct to consider its application to this case, the lower courts interpreted the statute in a manner at odds with the precedent of the highest Court in the Commonwealth. The Board of Education preserved this issue for review by filing a written response to Mr. Forte's supplemental memorandum that opposed the circuit court's consideration of his argument related to KRS 413.270 (ROA p. 28), and then

reiterated its position before the Court of Appeals (Brief for Appellant in Court of Appeals pp. 18-20).

Even if KRS 413.270 applies to Board of Claims cases generally, and even if Mr. Forte properly and timely raised its application as an issue in this case, the lower courts' construction of KRS 413.270 was erroneous. The Kentucky courts have interpreted KRS 413.270 to afford a plaintiff only one opportunity to litigate his case in the proper tribunal with jurisdiction over his claim. Mr. Forte has already litigated this claim before the Board of Claims. As a result, KRS 413.270 does not permit him to re-litigate his claim in that forum.

This Court's predecessor held in *Fielder v. Hansbrough*, 195 Ky. 574, 242 S.W. 832 (1922), that a statute analogous to KRS 413.270 allowed only one opportunity to litigate a case in the proper forum when a case is dismissed in another forum for lack of jurisdiction. The *Fielder* case concerned an action for false arrest. *Id.* at 832. The plaintiff first filed an action in the Jefferson Circuit Court, and then filed an identical action in the Shelby Circuit Court the following day. *Id.* The Shelby Circuit Court properly had jurisdiction over the case. *Id.* Thereafter, the plaintiff voluntarily dismissed the case in the Shelby Circuit Court. *Id.* at 833. The defendants were later successful in having the Jefferson Circuit Court case dismissed on jurisdictional grounds. *Id.* The plaintiff thereafter re-filed the action in the Franklin Circuit Court, a court that had concurrent jurisdiction with the Shelby Circuit Court over the case, but after the statute of limitations had run. *Id.*

The *Fielder* Court framed the issue by stating that the plaintiff's case in the Franklin Circuit Court was barred "unless the time for filing suit was extended by section 2545, Kentucky Statutes." *Id.* at 833. That statute provided as follows:

Where an action has been or shall be commenced in due time and in good faith, in any court of this commonwealth, and the defendants, or either of them, have or shall make defense, and it shall be adjudged that such court had or has no jurisdiction of the action, the plaintiff or his representative may, within three months from the time of such judgment, commence a new action in the proper court, and the time between the commencement of the first and last action shall not be counted in applying the limitation.

Fielder, 242 S.W.2d at 832. The Court of Appeals held, "[The statute] was designed to give a party who first proceeded in the wrong court an opportunity to proceed in the right court; but the statute contemplates only one opportunity. Hence, if it is made to appear, as in this case, that the litigant has already proceeded in the proper court, ... the statute does not apply, and the bar is complete, although another action in another court was dismissed for want of jurisdiction." *Id.* at 833. Because either Shelby Circuit Court or Franklin Circuit Court would have been a "proper court" in which the plaintiff could have filed suit, the dismissal of the action in the former prohibited the filing of the case in the latter, notwithstanding an intervening dismissal for lack of jurisdiction that otherwise would have triggered the application of the savings statute.

Mr. Forte has already filed one claim in the Board of Claims. As discussed, *supra*, the Board of Claims correctly determined that it had jurisdiction over Mr. Forte's claim and that the claim was not timely filed. KRS 413.270 applies only when there is one action pending in a court without jurisdiction; it does not

apply in situations in which two cases are pending concurrently, one of which is in a tribunal with jurisdiction over the case. The Court of Appeals and the circuit court erred when they held that KRS 413.270 permits Mr. Forte a second opportunity to litigate his claim in the proper tribunal.

Further, the decisions of the Court of Appeals and the circuit court circumvent the purpose underlying the General Assembly's grant of primary and exclusive jurisdiction to the Board of Claims to determine its own jurisdiction. The circuit court essentially instructed the Board of Claims to defer to a future decision of the trial court in the tort action as to which of the tribunals has subject matter jurisdiction over Mr. Forte's claim: "[T]he best method for handling this matter appears to be a dismissal without prejudice so that [Mr.] Forte could re-file this action if the Nelson Circuit Court should dismiss his pending tort claim." (ROA p. 42; Appx. 2 p. 3.) The Court of Appeals affirmed, and it instructed, "[u]pon remand ..., we think the Board of Claims should reconsider its dismissal in light of the tolling provision of KRS 413.270(1)." (Appx. 1 p. 7.)

As discussed, *supra*, KRS 44.073 grants to the Board of Claims the primary and exclusive jurisdiction to determine whether it has jurisdiction over a claim. If another claim arising out of the same incident is concurrently pending before any other tribunal, that other tribunal must stay its hand and await the jurisdictional decision of the Board of Claims before it can proceed further with respect to that claim. Under KRS 44.073, the trial court where the tort claim was pending did

not have jurisdiction over it because the Board of Claims did not determine that it had no jurisdiction over the claim at issue in this case. Thus, because the circuit court has no jurisdiction, it could render no decision on the jurisdictional issue to which the Board of Claims could defer. The circuit court's opinion as to the "best method for handling this matter," which was affirmed by the Court of Appeals, clearly contradicts the intent of the General Assembly as expressed in its enactment of KRS 44.073.

The statute that was at issue in the *Fielder* case is identical to the present KRS 413.270(1) in all relevant respects. *Fielder* has never been overruled or abrogated by this Court; it is therefore on all fours with this case and should have been applied by the Court of Appeals and the circuit court. SCR 1.030(8)(a) and 1.040(5). Neither the Court of Appeals nor the circuit court mentioned, much less followed, the *Fielder* precedent. In the event this Court reaches the merits of the issue, it should affirm *Fielder* as viable precedent and reverse the decision of the Court of Appeals in this case.

Conclusion

The Board of Claims correctly determined that it had jurisdiction over Mr. Forte's claim and that the claim was filed past the expiration of the applicable statute of limitations. For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the final order of the Board of Claims should be reinstated.

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