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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2009-SC-000715-DG

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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

** ** * ** * ** * **

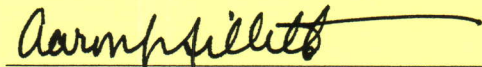
REPLY BRIEF FOR APPELLANT

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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 July 20, 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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Argument

I. Purpose and issues addressed by this brief

This Court granted discretionary review in this case to decide three issues: first, whether the Court of Appeals transgressed the separation of powers principles enshrined in the Kentucky Constitution when it held, relying in part on KRS 413.270(1), that the Board of Claims must defer to the decision of the circuit court in a parallel tort action as to which of the two tribunals had subject matter jurisdiction of the claim (Motion for discretionary review, pp. 11-15); second, whether the Court of Appeals and the circuit court correctly considered legal issues on appeal not presented first to the Board of Claims (*id.*, pp. 8-11); and third, whether the Court of Appeals correctly held that KRS 413.270(1) allows the Appellee, Gene A. Forte, more than one opportunity to litigate his claim before the Board of Claims (*id.*, pp. 5-8). The Nelson County Board of Education addressed all three of these issues in its brief. Mr. Forte's brief does not even address the second or third of these issues. Accordingly, the Board of Education will not reiterate the arguments it has already made on these points. (Brief for Appellant, pp. 18-26.) The Board of Education simply will reply to Mr. Forte's argument that his claim filed in the Board of Claims is saved by the tolling provision of KRS 413.270(1).

II. **The principal issue in this case is not whether local boards of education are generally immune from suit, but rather, which tribunal is empowered to make that determination in a specific case.**

Mr. Forte's argument appears to be that "[j]urisdiction will not lie with the Board [of Claims] if the alleged act of negligence can be addressed in State Court" (Brief for Appellee, p. 2), that the Board of Claims should have awaited the decision of the Nelson Circuit Court as to which tribunal had jurisdiction over his claim, and that the Board of Claims prematurely deprived him of his "only available remedy" by dismissing his claim prior to the circuit court's decision becoming final (*id.*, p. 3). With one exception, Mr. Forte does not cite to any case, statute, or other legal authority in support of his theory.

The only authority cited by Mr. Forte in his brief (p. 2) is *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), in which this Court held that, "[a]s a waiver of immunity, [KRS 44.072] has no application to those governmental agencies, officers or employees who are not cloaked with immunity." *Yanero*, 65 S.W.3d at 524. This misses the point, however, because the Board of Education does not argue in this case that the Board of Claims has jurisdiction over non-immune government agencies. It is beyond cavil that local boards of education are generally afforded governmental immunity and covered by KRS 44.072. *Id.* at 527 (a local board of education "is entitled to governmental immunity, but not sovereign immunity"); see *Grayson County Bd. of Ed. v. Casey*, 157 S.W.3d 201, 203 (Ky. 2005).

Mr. Forte also quotes that portion of *Yanero* in which this Court held, "To the extent that [KRS 44.073(8)] attempts to transfer jurisdiction over non-immune agencies, officers and employees from the circuit court to the Board of Claims, it is unconstitutional" under Section 112(5) of the Kentucky Constitution. *Yanero*, 65

S.W.3d at 525.¹ Subsection (8) of KRS 44.073 purported to transfer jurisdiction over all claims against state agencies to the Board of Claims, not just those claims to which sovereign or governmental immunity applied at common law. Also, subsection (2) of that same statute purported to confer exclusive jurisdiction to the Board of Claims over claims for the negligent performance of ministerial acts by government employees, for which government employees are not immune at common law. Under *Yanero*, the General Assembly cannot create immunity where it does not exist at common law, but rather may only waive the Commonwealth's inherent immunity from suit in circumstances in which immunity already exists. *Id.* at 524. Because KRS 44.073(2) and (8) attempted to create new immunities from suit where immunity did not previously exist and to deprive claimants of access to the courts when claiming injuries due to non-immune governmental conduct, they were held unconstitutional. *Id.* at 524-25.

However, the Board of Education does not rely upon either subsection (2) or (8) of KRS 44.073 in this case. Instead, as stated in its brief (pp. 11-14), it principally relies upon KRS 44.073(5), which provides: "No action for negligence against [an agency of state government] or any officers, agents, or employees

¹ The Court based its holding on the portion of Section 112(5) that vests the circuit court with jurisdiction "of all justiciable causes not vested in some other court," stating that the Board of Claims "is not a court." *Yanero*, 65 S.W.3d at 525 (citing *Reyes v. Hardin Memorial Hosp.*, 55 S.W.3d 337, 343 (Ky. 2001)). This statement appears to be in tension with Section 231 of the Constitution, which permits the General Assembly to "direct in what manner and in what courts suits may be brought against the Commonwealth." (Emphasis added.) The Board of Claims Act, KRS Chapter 44, was enacted pursuant to this grant of authority, see *Williams v. Kentucky Dept. of Ed.*, 113 S.W.3d 145, 154 (Ky. 2003), and the Board of Claims is a "court" for purposes of Section 231. However, this seeming contradiction is not material to deciding this appeal.

thereof 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.*" (Emphasis added.) Accordingly, Mr. Forte's reliance on *Yanero* is misplaced.

KRS 44.073(5) does not create any new immunity not recognized at common law, and it does not abrogate any right to file a circuit court suit against a state agency for negligence in performing non-immune, proprietary functions or ministerial acts. The statute merely provides that the Board of Claims has primary and exclusive jurisdiction to determine if the negligence of a state agency was allegedly committed in the course of performing immune, governmental functions or discretionary acts.

If the Board of Claims determines that sovereign or governmental immunity applies, it retains jurisdiction over the claim and its jurisdiction is exclusive. KRS 44.072. If the Board of Claims determines that immunity does not apply in a particular case, it must dismiss the claim because it lacks jurisdiction; the claimant may then re-file his claim in the circuit court. *See* KRS 413.270(1). Together, KRS 44.073(5) and KRS 413.270(1) have the effect of tolling the statute of limitations for claims initially filed in the Board of Claims if the Board of Claims subsequently determines that it lacks jurisdiction. However, this does not mean that KRS 413.270(1) also tolls the statute of limitations for a claim initially filed in the circuit court against a state agency when the governmental action at

issue is a discretionary act or performed in the course of a governmental function.

Mr. Forte has not challenged the constitutionality of KRS 44.073(5), and he cannot do so at this late juncture. *See* CR 24.03; KRS 418.075(2). Instead, his brief in this Court and his arguments before the lower courts have completely ignored the effect that KRS 44.073(5) has on his claim, on the jurisdiction of the circuit court, and on the operation of KRS 413.270(1).

KRS 413.270(1) deals generally with the ability of a litigant to re-file his claim in a tribunal with jurisdiction after a different tribunal dismisses the claim because it lacks jurisdiction. In such a case, the former judgment is binding on the tribunal with jurisdiction over the claim. KRS 44.073(5) deals specifically with claims against state agencies that are generally afforded sovereign or governmental immunity, like local boards of education. The Board of Claims is granted exclusive jurisdiction by the Board of Claims Act to decide whether it has jurisdiction over a claim filed against such an agency in the context of a specific case. KRS 44.073(3) and (4). It need not abide by a jurisdictional determination made by a circuit court, which under KRS 44.073(5) lacks jurisdiction to decide the issue.

Under established rules of statutory construction, "when two statutes deal with the same subject matter, one in a broad, general way and the other specifically, the specific statute prevails." *Land v. Newsome*, 614 S.W.2d 948, 949 (Ky. 1981); *Commonwealth v. Phon*, 17 S.W.3d 106, 107 (Ky. 2000); *Withers v.*

University of Kentucky, 939 S.W.2d 340, 345 (Ky. 1997). KRS 44.073(5), as the more specific statute, prevails over KRS 413.270(1).

Mr. Forte, the Court of Appeals, and the Nelson Circuit Court all have made the same crucial error in this case: they would have the Board of Claims defer to the jurisdictional determination made by the circuit court in the parallel tort action. This position ignores the plain text of KRS 44.073(5), which strips the circuit court of the power to make such a judgment and ensures that all claims to which sovereign or governmental immunity applies are funneled through the Board of Claims. This statute is a necessary and proper means of implementing the General Assembly's authority under the Constitution to "direct in what manner and in what courts suits may be brought against the Commonwealth," Ky. Const. § 231, and ensuring that state agencies need not endure unnecessarily the costs and burdens of defending a tort action in circuit court. *See Breathitt County Bd. of Ed. v. Prater*, 292 S.W.3d 883, 886-87 (Ky. 2009) (immunity entitles its possessor to be free not merely from liability but also from the burdens of defending a tort action).

KRS 44.073(5) does not deprive any claimant of his day in circuit court in the event his claim arises out of the negligent performance of a ministerial act or a proprietary function. It does not purport to create any new immunity from suit. Therefore, KRS 44.073(5) does not contravene *Yanero* in any respect. But it does require the circuit court to stay its hand until the Board of Claims decides which tribunal ultimately has jurisdiction over the claim. Accordingly, the circuit court

has no power to decide the issue and KRS 413.270(1) cannot apply to any such decision made by the circuit court.² Mr. Forte's claim, therefore, is not saved by KRS 413.270(1) and the Board of Claims did not err by dismissing his claim with prejudice.

Conclusion

The Board of Claims had jurisdiction over Mr. Forte's claim, which was filed after the applicable statute of limitations expired. For this reason, 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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² At the very least, a claimant should not receive the benefit of ignoring the plain import of KRS 44.073(5). If he initially files his claim in the circuit court and it is subsequently determined that the claim arises out of the negligent performance of a governmental function or a discretionary act, to which immunity applies, then KRS 413.270(1) should not be construed to save his improperly-filed claim because it was not initially commenced in good faith, as the savings statute requires.