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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2009-SC-000715-DG
(TO BE HEARD TOGETHER WITH)
2010-SC-000149-DG

NELSON COUNTY BOARD OF EDUCATION

APPELLANT

V. ON REVIEW FROM THE 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, DECEASED

AND

KENTUCKY BOARD OF CLAIMS

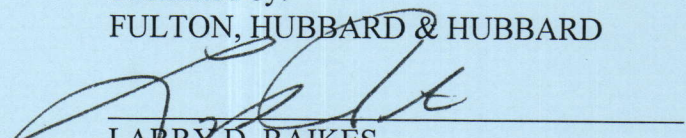
APPELLEES

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BRIEF FOR APPELLEE FORTE

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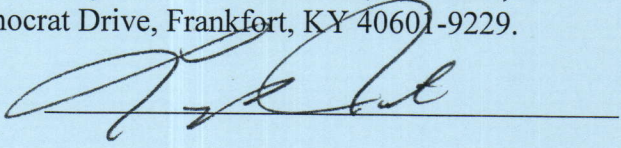
Submitted by:
FULTON, HUBBARD & HUBBARD



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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 6, 2010: Hon. Charles C. Simms, III, Judge, Nelson Circuit Court, 200 Nelson County Plaza, Bardstown, KY 40004; Hon. Aaron J. Silletto Goldberg Simpson, LLC, 9301 Dayflower Street, Prospect, KY 40059; Hon. G. Mitchell Mattingly, Kentucky Board of Claims, 130 Brighton Park Boulevard, Frankfort, KY 40601; and to Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9229.



STATEMENT CONCERNING ORAL ARGUMENT

The Appellee, Forte, does not believe that oral arguments would be necessary in this case, believing that the briefs will adequately allow the Court to recognize and decide the issues presented.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

Statement Concerning Argument i

Counterstatement of Points and Authorities.....ii

KRS 342.700
Commonwealth v. Douglas, Case No. 2007-CA-000647
Yanero v. Davis, Ky., 65 S.W.3d 510 (2001)
KRS 342.690
KRS 413.270(1)

Appendix

Counterstatement of Case1

Counter-Argument.....2

Conclusion3

COUNTERSTATEMENT OF THE CASE

Carole Forte was a teacher at Cox's Creek Elementary School in Nelson County, Kentucky. On May 19, 2006, Mrs. Forte died when a pole gate upon school property was blown into the path of her vehicle as she was attempting to leave the school premises. She was struck in the head by the gate.

Appellee, Gene A. Forte, was appointed Administrator of his wife's estate. He then filed an action in Nelson Circuit Court, Civil Action No. 07-CI-00164, Division II, in which he asserted that Mrs. Forte's death resulted from the negligent design, assembly, testing, inspection and operation of the pole gate by the Nelson County Board of Education, its employees, agents and servants.

On April 23, 2008, Mr. Forte filed a claim with the Kentucky Board of Claims and a motion to hold said claim in abeyance pending completion of the Civil Action No. 07-CI-00164. In the motion to hold in abeyance, a copy of which is attached to this brief, Mr. Forte alleges, inter alia, 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 the 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."

On June 19, 2008, the Board of Claims entered a final order denying Forte's motion to hold in abeyance and dismissing his claim, a copy of which is filed with Appellant's brief.

Forte appealed from the Board's order to the Nelson Circuit Court, which entered an order vacating and remanding the matter to the Board with directions to consider other action discussed in the Court's order. A copy of the final decision of Nelson Circuit Court is filed with the Brief of

Appellant. In that decision, the Court noted as follows:

“ . . . Mr. Forte’s action before the Kentucky Board of Claims is presently barred by KRS 44.110(1). 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 Mr. Forte may have ninety (90) days to re-file said action in the appropriate forum - Kentucky Board of Claims. See KRS 413.270; and Commonwealth v. Douglas, Case No. 2007-CA-000647.”

Appellant then appealed from this final order of Nelson Circuit Court to the Kentucky Court of Appeals, which affirmed the Circuit Court decision. A copy of the Court of Appeals opinion is filed with Appellant’s brief herein. The Appellant then moved this Court for discretionary review, which was granted.

COUNTER-ARGUMENT

In order to prevail in his Nelson Circuit Court tort action, Appellee Forte has the burden of proving that it is not barred by immunity or the exclusive provision of KRS 342.690. Before an action accrues for presentation through the Board of Claims, there must first be a finding that the Board of Claims has jurisdiction. Jurisdiction will not lie with the Board if the alleged act of negligence can be addressed in State Court.

As noted in Yanero v. Davis, Ky. 65 S.W.3d 510 (2001), “as a waiver of immunity (KRS 44.072), it has no application to those governmental agencies, officers or employees who are not cloaked with immunity.” And, further,

“To the extent that the statute attempts to transfer jurisdiction over non-immune agencies, officers and employees from Circuit Court to the Board of Claims, it is unconstitutional”

Appellee holds the position that the negligence of the school officers or employees complained of in the Nelson Circuit Court action does not fall within the umbrella of immunity or the exclusive provision of KRS 342.690.

The Nelson Circuit Court has ruled against Forte on this issue through a summary judgment which has been entered and which is the subject of Appeal No. 2010-SC-00049-DG. If this Circuit Court dismissal of Appellee Forte's tort action ultimately stands and becomes final, his only remaining remedy would be in the Board of Claims. Both the Nelson Circuit Court and the Court of Appeals found that KRS 413.270(1) should apply to Appellee Forte's claims.

The ultimate ruling of the Court of Appeals was as follows:

“Upon remand to the Board of Claims, we think the Board of Claims should reconsider its dismissal in light of the tolling provision of KRS 413.270(1).”

CONCLUSION

The purpose and intent of the Board of Claims Act is to provide a means for seeking remedies where the alleged wrongdoer is immune from suit in Circuit Court. To dismiss a Board of Claims claimant, like Appellee Forte, before jurisdiction attaches, the Board defeats that purpose and intent. It is respectfully submitted that the Circuit Court and the Court of Appeals recognized such dichotomy in making their decisions appealed from herein, and, perforce, the decision of the Court of Appeals should be affirmed.

Submitted by:

FULTON, HUBBARD & HUBBARD

A handwritten signature in black ink, appearing to read 'L. Raikes', is written over a horizontal line.

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