COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2011-SC-000563

STEVEN L. BESHEAR, in his official capacity as the Governor of the Commonwealth of Kentucky; and MARY E. LASSITER, in her official capacity as State Budget Director

APPELLANTS

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. and KENTUCKY WORKERS' COMPENSATION FUNDING COMMISSION

APPELLEES

APPEAL FROM FRANKLIN CIRCUIT COURT
Honorable Thomas Wingate
No. 03-CI-01547

REPLY BRIEF FOR APPELLANTS GOVERNOR STEVEN L. BESHEAR AND STATE BUDGET DIRECTOR MARY E. LASSITER

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Appellants' Reply Brief has been served upon the following, by first-class mail, postage prepaid, on the 29th day of June, 2012: Hon. Thomas Wingate, Courthouse, 669 Chamberlin Avenue., Frankfort, Kentucky 40601; Edward O'Daniel, Jr., 110 West Main Street, Springfield, Kentucky 40069; Mark D. Guilfoyle, Dressman, Benzinger & LaVelle, PLLC, 207 Thomas More Parkway, Crestview Hills, Kentucky 41017-2596; Frank Dickerson, General Counsel, Kentucky Workers' Compensation Funding Commission, 42 Millcreek Park, P.O. Box 1128, Frankfort, Kentucky 40602.

Christopher W. Brooker

STATEMENT OF POINTS AND AUTHORITIES

May It Please the Court:

The Workers' Compensation Special Fund at the heart of this case was created in 1998 to cover Special Fund liabilities. It is a "commingled" fund, in that it is funded by both (1) "public" General Fund appropriations and (2) "private" assessment revenues. When facing a budget shortfall in 2001, the General Assembly took many actions to fulfill its constitutional duty to balance the budget, two of which involved the Special Fund. First, it suspended the annual $19 million appropriation from the General Fund to the Special Fund. Second, it required that over $8 million (of the $80.75 million) already transferred from the General Fund to the Special Fund be transferred back to the General Fund. At that time the General Assembly believed that such transfers were constitutional under *Com. ex. rel. Armstrong v. Collins*, 709 S.W.2d 437 (Ky. 1986), which counseled that "public" funds could be transferred out of commingled funds so long as they could be "differentiated" from the "private" funds therein. *Id.* at 446.

Haydon Bridge Company, Inc. ("Haydon Bridge")[1] challenged both budget-balancing actions in this case [TR1, pp. 1-12]. The trial court ruled that both actions violated the republication provision of Section 51 of the Kentucky Constitution [TR1, pp. 255-261]. In January, 2010, this Court reversed the trial court on the larger issue, ruling that the legislature's suspension of the annual $19 million appropriation was constitutional. This Court, however, affirmed the trial court on the smaller issue, holding that the transfers out of the Special Fund were unconstitutional because the "public" funds therein could not be differentiated from the "private" funds therein:

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[1] There are actually six Appellees in this case. For simplicity's sake, the Governor and Budget Director refer to all six Appellees collectively herein as "Haydon Bridge."

> Thus, in this instance, we are compelled to conclude the funds in question – those actually taken from the hands of the KWCFC and BRF – have not been sufficiently differentiated and the transfers therefore are improper.

Beshear v. Haydon Bridge Co., Inc., 304 S.W.3d 682, 705 (Ky. 2010).

The question now before this Court is whether the trial court can order the Governor to appropriate millions of dollars to the Special Fund to "remedy" the transfers made from 2001 through 2010 in violation of Section 51. The doctrines of sovereign immunity and separation of powers answer that question with an affirmative "no."

ARGUMENT

I. SOVEREIGN IMMUNITY BARS HAYDON BRIDGE'S DEMAND FOR $32,781,000 IN GENERAL FUNDS.

It is black-letter Kentucky law that in order for there to be an award of monetary relief in this case the legislature must have first waived the State's sovereign immunity. KY. CONST. § 231. The legislature has not done so, and Haydon Bridge's various attempts to manufacture the necessary waiver fail as a matter of law.

A. Haydon Bridge's Attempt to Analogize This Case to *Ross v. Gross* Fails.

In *Ross v. Gross*, 300 Ky. 337, 188 S.W.2d 475 (1945), Kentucky's highest court held that funds that are improperly deposited into the State Treasury can be refunded to their true owner without a legislative appropriation. Accordingly, in an attempt to analogize this case to *Ross*, Haydon Bridge claims that the transfers at issue constituted improper deposits into the State Treasury [Response, pp. 20-23]. In support of that claim, Haydon Bridge alleges the following "facts:" (1) "[T]he BRF is not owned by the Commonwealth," (2) the funds "are held by a statutorily-created corporation," and (3) "the BRF is a private trust over which the General Assembly has no authority" [*id.* at 21-22]. Haydon Bridge also "den[ies] that BRF funds are lodged in the State Treasury,"

and claims that "the General Assembly has no power over private funds – even those deposited in the State Treasury" [*id.*].

Haydon Bridge's "factual" assertions are all demonstrably false. First, the BRF ***is*** owned by the Commonwealth. Since 1998 it has been "established within" the KWCFC. KRS 342.1229. The KWCFC, in turn, is "**an agency of the Commonwealth** for the public purpose of controlling, investing, and managing the funds collected pursuant to KRS 342.122." KRS 342.1223(1)(emphasis added). Accordingly, the KWCFC is not a "corporation" as Haydon Bridge falsely suggests. Indeed, the KWCFC does not appear anywhere on the Secretary of State's database of Kentucky corporations.

Second, the BRF is not a "private trust over which the General Assembly has no authority." The words "trust fund" do not appear anywhere in KRS Chapter 342, which establishes and governs the BRF. And there certainly is no BRF trust contract between a settlor and trustee. Instead, the BRF is a creature of statute, born by the General Assembly, and the statutes giving it life do not declare it to be a "trust."

That said, there are undeniably statutory and constitutional restrictions on how money in the BRF may be spent. Indeed, this Court has already opined that money may not be transferred from the Special Fund to the General Fund or the Department of Mines and Minerals. And because of such restrictions, agency accounts like the Special Fund are often referred to as a "trusts" in an "informal, descriptive sense, rather than as declaration of a formal trust relationship." *In re Certified Question*, 527 N.W.2d 468, 479 (Mich. 1994)(where the Michigan Supreme Court rejected a plaintiffs' claim that a state accident fund was a "trust" fund). The BRF is ***not*** a formal or private trust governed by a trust agreement, but consists of two separate agency accounts – the Special Fund and

the Pneumoconiosis Fund – that are owned 100% by the State, albeit with restrictions on how that money can be spent.

Third, the BRF is undeniably part of the State Treasury. Specifically, both the Special Fund and the Pneumoconiosis Fund are agency accounts, and as such, they are part of the State Treasury. KRS 45.253(2-4). When employers (or their insurers) pay assessments to the KWCFC, those funds are deposited into the State Treasury, and are then credited to the appropriate BRF fund. KRS 45.253(3), KRS 342.122(1)(d). This fact is confirmed by the State Treasurer's Annual Reports for 2001-2010, which each show that the State Treasury is the depository for KWCFC assessment revenues [TR3, p. 365]. Moreover, if the BRF were not part of the State Treasury, the General Assembly could not have even made the transfers at issue. The State Treasury, after all, is the only purse that the legislature controls. While money in the two BRF accounts is indeed labeled as "private," that label simply means that the money therein can only be used to "specially benefit" those who pay the supporting assessments. It does not mean that a private entity actually owns the accounts. Accordingly, Haydon Bridge's attempt to equate this case to *Ross v. Gross* falls flat.[2]

B. Haydon Bridge's Attempt to Revitalize Its Failed Takings Claim Should Be Rejected.

In a desperate effort to avoid sovereign immunity, Haydon Bridge tries to revitalize its argument that the Budget Bill transfers at issue constituted "takings" of private property in violation of Section 242 of the Kentucky Constitution. In fact,

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[2] Haydon Bridge cites to two Agreed Orders from unrelated cases in support of their attempt to analogize this case to *Ross v. Gross* [Response, p. 34]. This is improper, because as Haydon Bridge admits, "the other cases arise out of different circumstances and different scenarios" [Response, p. 34, fn. 24].

Haydon Bridge goes so far as to claim that this Court's prior opinion found that the transfers at issue violated Section 242:

> This Court's ruling in *Haydon Bridge* that the General Assembly may not expropriate private funds for public purposes is tantamount to a ruling that the government may not "take private property for public use" under Section 242 – without making "just compensation for property taken."

[Response, p. 29].

Haydon Bridge seriously misleads. The truth is that this Court's prior opinion noted that Haydon Bridge made a Section 242 "takings" argument in one sentence, and therefore this Court refused to even consider it:

> Appellees [Haydon Bridge and its co-Plaintiffs] also assert in a one sentence statement, without argument or explanation, that such conduct violates "due process" and Section 242 of the Kentucky Constitution. However, we are not inclined to review such arguments without citation to authority or explanation. CR 76.12(4)(c)(v).

Haydon Bridge, 304 S.W.3d at 697, n.17.

The fact that Haydon Bridge would now suggest that this Court's prior opinion found a violation of Section 242 in light of the above-quoted footnote is disappointing. In reality, Haydon Bridge's Section 242 claim was settled ***against*** Haydon Bridge, and became the law of this case, when this Court issued its prior decision:

> It is the rule in this jurisdiction that issues raised on appeal but not decided will be treated as settled against the appellant[3] . . . .

Commonwealth, Dept. of Highways v. Taub, 766 S.W.2d 49, 51-52 (Ky. 1989)(overruled on other grounds). This "law of the case" rule is "aimed at preserving finality and preventing re-litigation of issues on a second trip to the same appellate court." *Fischer v. Fischer*, 348 S.W.3d 582, 594 (Ky. 2011).

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[3] Haydon Bridge previously raised the takings issue in this Court as a cross-appellant.

Haydon Bridge, however, suggests that it may "raise Section 242 defensively in this phase of the case" [Response, p. 30]. This is nonsense. A party cannot revive a unsuccessful claim by unilaterally labeling it as "defensive" – whatever that means. And regardless of what that means, it is preposterous to label Haydon Bridge's claim to $32,781,000 as "defensive." The fact is that Haydon Bridge is trying to relitigate its takings claim, despite telling the trial court on April 19, 2011 that "***Plaintiffs are not making a takings claim***" [R3, p. 318 (emphasis in original)].[4]

C. It Makes No Difference Whether Haydon Bridge Is Seeking "Restitution" or "Damages."

Haydon Bridge asserts that it is not seeking damages, but instead seeks "equitable" restitution [Response pp. 26-28]. This is a distinction without a difference. In *Collins v. Chandler*, 2003 WL 22149515 (Ky. App. 2003)(unpublished opinion, copy attached), individuals sought "restitution" of tobacco settlement funds received by the State, and claimed that that sovereign immunity did not apply since they were seeking "restitution." The Court of Appeals disagreed, recognizing that if plaintiffs were successful "their relief would be in the form of disbursement of funds from the Commonwealth's treasury. The Commonwealth is clearly protected from this type of interference with governmental function. . . . [T]here is really no way to categorize the relief sought by plaintiffs other than as monetary relief," so "sovereign immunity bars the

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[4] Haydon Bridge previously (and wisely) abandoned its takings claim because it is groundless. As described in detail above, the transfers at issue only involved State-owned funds, and simple logic dictates that the State cannot "take" property from the State in violation of Section 242. *See, e.g., McAvoy v. H. B. Sherman Co.*, 258 N.W.2d 414, 429 (Mich. 1977), and *John J. Orr & Sons, Inc. v. Waite*, 479 A.2d 721, 726-727 (R.I. 1984) (denying takings claims in similar contexts).

plaintiffs' suit." *Id.* at 2. This Court then denied plaintiffs' motion for discretionary review. *Id.* at 1. And it should now deny Haydon Bridge's identical "restitution" argument.

II. REQUESTING INJUNCTIVE RELIEF CONFIRMS THAT MONETARY RELIEF IS UNAVAILABLE.

Haydon Bridge's successful effort to temporarily enjoin transfers from the Pneumoconiosis Fund in the 2011-2012 budget biennium confirms that it could have utilized CR 65 to obtain similar temporary injunctions restraining ***all*** of the transfers at issue in this case ***before*** they were made. But Haydon Bridge chose not do so.

Unable to justify this choice, Haydon Bridge struggles to create the illusion that it moved to temporarily enjoin all of the transfers and that the trial court "refused" its motion. Namely, Haydon Bridge suggests that it moved for a temporary injunction because (1) the numerous iterations of its Complaint stated a general claim to injunctive relief, (2) that in June, 2004, it "notified the defendants and the Court that injunctive relief would be sought if further transfers were initiated," (3) at one point in 2005 Haydon Bridge unsuccessfully moved for a temporary restraining order (not a temporary injunction) on $9.5 million in transfers to the General Fund, and (4) that in 2006, Haydon Bridge filed a "motion for injunction" whereby it sought [a] monetary relief and [b] *permanent* injunctive relief [Response, pp. 9-13, 35-37]. Haydon Bridge then contends that the trial court "refused" these efforts [*id.* at 35-37].

None of the above-listed actions, however, actually constitute a motion for temporary injunction. In reality, the trial court never "refused" to temporarily enjoin ***any*** Budget Bill transfer as Haydon Bridge implies. Instead, in 2010, the trial court actually granted the ***one*** temporary injunction motion that Haydon Bridge made in this case.

But even had the trial court "refused" a temporary injunction motion, that would not give rise to a claim to monetary relief as Haydon Bridge suggests. Instead, such a "refusal" gives rise to the right to immediately appeal the "refusal" to the Court of Appeals. CR 65.07. Haydon Bridge, of course, never appealed from a "refusal" of a temporary injunction motion because there never was such a "refusal" in this case.

At bottom, both Haydon Bridge and the trial court have lost sight of the basic rule that monetary relief and temporary injunctive relief are mutually exclusive remedies. If monetary relief is available as the trial court opined in 2011, it should have never enjoined the transfers from the Pneumoconiosis Fund in 2010. But it did, and later ruled that monetary relief could also flow from similar transfers. The trial court erred.

III. HAYDON BRIDGE HAS NO STANDING TO CHALLENGE TRANSFERS FROM THE PNEUMOCONIOSIS FUND.

It is undisputed that Haydon Bridge has never paid a dime into the Pneumoconiosis Fund. Moreover, the Pneumoconiosis Fund and the Special Fund have entirely separate and distinct funding sources and liabilities [TR3, pp. 89-123]. While both funds pay pneumoconiosis claims, those claims are distinct and separate – the Special Fund pays claims where the injured worker's last exposure was incurred before December 12, 1996, whereas the Pneumoconiosis Fund pays claims where the injured worker's last exposure was on or after that date. KRS 342.1241, KRS 342.1242.

Nevertheless, Haydon Bridge suggests that the Special Fund and Pneumoconiosis Fund are "interconnected" because both funds happen to pay black lung benefits [Response, p. 39]. Haydon Bridge deceives. The fact that two funds pay a certain type of benefits does not render them "interconnected." Here, the two funds' black lung obligations are completely separate and distinct based upon the date of last

exposure. KRS 342.1242. Accordingly, the Special Fund and Pneumoconiosis Fund have nothing to do with each other. If Haydon Bridge's rationale were sound, that would mean that the University of Louisville's "Cardinal Athletic Fund" and the University of Kentucky's "K Fund" are "interconnected" simply because they both provide scholarships to student-athletes, albeit to different students at different schools. And as a result, a Cardinal Athletic Fund donor would have standing to challenge how the K Fund spends its money. This rationale fails on its face. But it is exactly what Haydon Bridge argues, and is exactly what the trial court found [TR3, p. 136].

Haydon Bridge also suggests, and the trial court found, that the Special Fund and Pneumoconiosis Fund are "interconnected" by KRS 342.1232. Again, Haydon Bridge and the trial court are wrong. KRS 342.1232 provides that "***administrative savings*** as a result of the implementation of 1996 (1st Extra. Sess.) Ky. Acts ch. 1 shall be used to defray the special fund assessment on all employers in the Commonwealth" (emphasis added). Without any supporting authority, Haydon Bridge contends (and the trial court found) that "administrative savings" is the same thing as "excess assessment revenue," meaning that if Pneumoconiosis Fund assessments happen to generate excess revenue, "those savings must be considered when determining assessment rates for those paying into the Special Fund" [Response, p. 42; TR3, p. 226].

The suggestion that "administrative savings" are the same thing as "surplus revenue" is absurd on its face. And it is absurdity is confirmed by the actuarial analysis of the BRF, which demonstrates that the KWCFC does not (and logically cannot) consider surplus revenue in the Pneumoconiosis Fund when setting Special Fund assessment rates, as the funds have nothing to do with one another other than the fact that

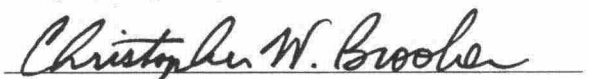
they are both managed by the KWCFC [TR3, pp. 89-123]. Therefore, KRS 342.1232 does not "interconnect" the two funds in any way. Accordingly, Haydon Bridge has no standing upon which to challenge transfers from the Pneumoconiosis Fund.

IV. HAYDON BRIDGE'S ATTORNEY FEE CLAIM FAILS.

It is undeniable that the trial court granted Haydon Bridge's motion for attorney fees, which Haydon Bridge pegs at $8,195,250, without providing the Governor and Budget Director any opportunity to be heard. Haydon Bridge, however, suggests that the Governor and Budget Director had an adequate opportunity to be heard because they could have filed a CR 59 or CR 60 motion ***after*** the trial court ruled against them.

Haydon Bridge's argument is a non-starter. The Due Process Clause guarantees litigants the opportunity to be heard by a court ***before*** that court rules on a motion – especially one asking Kentucky taxpayers to pay two lawyers $8,195,250. Civil Rules 59 and 60 do not provide the trial court with a license to rule on a motion without first hearing from both sides. Moreover, like all losing litigants, a person who is denied a hearing is not required to file a CR 59 or 60 motion before appealing the adverse decision to a higher court. But that is exactly what Haydon Bridge suggests. This argument is as groundless as Haydon Bridge's argument that Kentucky's "common fund" statute can be applied to this case. Both arguments should be rejected.

Respectfully submitted,



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