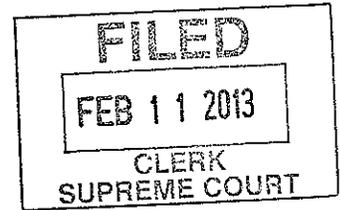


COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2012-SC-000197-D



LOUISVILLE SOCCER ALLIANCE, INC.;
MICHAEL E. HAYES; LOUISVILLE SOCCER CLUB, INC.;
DOUGLAS LANHAM; KENTUCKY SOCCER ASSOCIATION, INC.;
REBECCA NALLEY; CATHOLIC CONFERENCE OF KENTUCKY;
EDWARD C. MONOHAN; HOLY NAME OF JESUS PARISH;
AND REV. J. EWARD BRADLEY

APPELLANTS

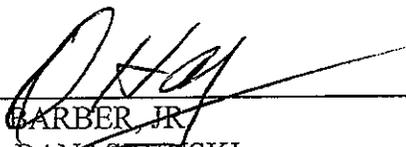
vs. **On Discretionary Review from the Kentucky Court of Appeals**
Case No. 2011-CA-000406

Appeal from the Franklin Circuit Court
Honorable Phillip J. Shepherd, Judge
Case No. 08-CI-1208

STEVEN L. BEHEAR, IN HIS OFFICIAL
CAPACITY AS THE GOVERNOR OF KENTUCKY;
TODD HOLLENBACH, IN HIS OFFICIAL CAPACITY
AS STATE TREASURER; JONATHAN MILLER, IN HIS
OFFICIAL CAPACITY AS SECRETARY OF THE FINANCE
AND ADMINISTRATION CABINET; MARY LASSITER,
IN HER OFFICIAL CAPACITY AS STATE BUDGET DIRECTOR;
AND ROBERT VANCE, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF THE PUBLIC PROTECTION CABINET

APPELLEES

REPLY BRIEF ON BEHALF OF APPELLANTS



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CERTIFICATE OF SERVICE

It is hereby certified that the original and nine copies of the foregoing Reply Brief for Appellants have been mailed, postage prepared, to Susan Stokley Clary, Clerk, Supreme Court of Kentucky, 700 Capitol Avenue, Room 235, Frankfort, KY 40601-3415; and a copy each to: Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601, Hon. Phillip J. Shepherd, Judge, Franklin Circuit Court, 669 Chamberlin Ave., P.O. Box 678, Frankfort, KY 40602; Mr. Stephen Pitt and Christopher W. Brooker, WYATT, TARRANT & COMBS, LLP, 500 West Jefferson St., Suite 2800, Louisville, KY 40202, this 8 day of February, 2013.



COUNSEL FOR APPELLANTS

PURPOSE

The purpose of this Reply Brief is to respond to the Counterstatement of the case and material facts, legal authority, arguments and analysis in the Brief filed on behalf of the Appellees.

The lack of a response to any of the Appellees' particular points or arguments or analysis means that the Appellant adopts and reasserts the argument made in its opening Brief.

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ARGUMENT

I. REPLY TO COUNTERSTATEMENT OF THE CASE

In its discussion of material facts, the Appellees assert that the legislature took action to fulfill its constitutional duty to balance the budget. Yes, there is a constitutional duty to balance the budget. It is the responsibility of the General Assembly to enact a balanced budget. It is not their duty to suspend “no lapse” statutes, such as the charitable gaming regulatory fund, and transfer “excess funds” from the agency account to the general fund in order to balance the budget. This is not the “action specifically blessed by the Kentucky Supreme Court in *Armstrong*, 709 S.W.2d at 446-447.”¹ (Appellees’ Brief at page 7.)

How does one reconcile the discussion by the Appellees, or the Court of Appeals, regarding the breadth of the suspended statute? The Appellees posit or note that “[w]hile the Court of Appeals recognized that ‘the trial court has expressed valid concerns that some statutes are routinely and repeatedly suspended,’ it concluded that ‘the proper forum is not this Court but rather the General Assembly itself’ [*id.* at 14].” (Appellees’ Brief at page 9.)

The repeated statutory suspensions, as aptly noted by the trial court, clearly evidence the General Assembly’s inability to enact a balanced budget on an annual and biennial basis.

¹ Commonwealth ex rel. Armstrong v. Collins, 709 S.W.2d 437 (Ky. 1986).

**II. THE FUND TRANSFER, AT ISSUE HEREIN,
WAS NOT CONSTITUTIONAL**

Throughout the argument of the Appellees, there is an effort to bootstrap the unconstitutional fund transfers involving charitable gaming to constitutional permissible transfers through repeated references to *Armstrong*.

At page 10 of their Brief, the Appellees correctly note that “neither the General Assembly, nor any of its fee-setting authorities, possess a crystal ball, and they therefore cannot precisely match the fee revenues with the costs of the regulatory scheme, which are established in various appropriations. As a result, regulatory fee revenues can and do sometimes produce more revenue than needed to cover the regulatory costs.”

The fact that the Appellants’ chart (Appellants’ Brief, p. 9, Table 1) vis-à-vis charitable gaming, indicates that the expenditures reasonably closely track the amount of funds received, does not mean that the transfer of restricted funds from the charitable gaming account are not inappropriate and invalid.

At pages 11-12, the Appellees correctly state that “the statutory formula at KRS 238.570(3) confirms as a matter of law that the primary purpose of the charitable gaming fee is to create funds sufficient to cover the costs of regulating the activity, not to generate revenue for the state. Moreover, the Charitable Gaming Act contains genuine regulatory provisions. Therefore, the charitable gaming regulatory fee is a constitutional exercise of the state’s police power, regardless of the fact that it happened to produce a surplus that could be transferred to the General Fund in 2008 in order to balance the budget.”

The validity of the formula does not mean that the excess funds may be transferred.

Both the Court of Appeals and the Appellees ignore the fact that it was only months before the matters at issue in this appeal that the 2007 Session of the General Assembly amended KRS 238.570.² Those amendments specifically provide that the amount of the charitable gaming fee may only be adjusted by October 1 of an odd-numbered year. The gaming fee calculation methodology is detailed. The anti-lapse

² 2007 Acts HB 156, Ch. 120, § 3

238.570

(1) A fee is imposed on charitable gaming in the amount of fifty-three hundredths of one percent (0.53%) of gross receipts derived from all charitable gaming conducted by charitable organizations required to be licensed in the Commonwealth of Kentucky. *The amount of the fee shall be adjusted by October 1 of each odd-numbered year in accordance with subsection (3) of this section.* Each licensed charitable organization shall remit to the office all moneys due *as set forth in administrative regulations promulgated by the office on a quarterly basis.* Failure by a licensed charitable organization to timely remit the fee required under this subsection upon notice of delinquency shall constitute grounds for disciplinary action in accordance with KRS 238.560.

(2) The charitable gaming regulatory account is hereby created as a revolving account within the agency revenue fund and under the control of the Environmental and Public Protection Cabinet. All revenues generated from the fee levied in subsection (1) of this section from license fees and from administrative fines, imposed by the office shall be deposited in this account. *Fund amounts attributable to the fee levied in subsection (1) of this section that are not expended at the close of a fiscal year shall not lapse but shall be carried forward to the next fiscal year.*

(3)(a) *No later than July 31 of each odd-numbered year, the Environmental and Public Protection Cabinet shall determine:*

1. *The amount of gross receipts during the prior biennium against which the fee collected under subsection 1 of this section was assessed; and*

2. *The final budgeted amount as determined by the enacted budget for the upcoming biennium for the administration and enforcement of the provisions of this chapter. If a budget is not enacted, the amount shall be the corresponding amount in the last enacted budget.*

b. On October 1 of each odd-numbered year, the fee assessed under subsection (1) of this section shall be proportionally adjusted by the Environmental and Public Protection Cabinet. The new rate shall be calculated by multiplying one hundred ten percent (110%) by the amount determined in paragraph (a)2. of this subsection, and subtracting from the amount one-half (1/2) of any remaining balance in the account. The total shall then be divided by the amount determined in paragraph (a)1. of this subsection. The result shall be expressed as a percentage and shall be rounded to the nearest thousandth of a percent (0.000%) Moneys in this account shall be expended by the office only in the administration and enforcement of provisions of this chapter. No later than July of each odd-numbered year, the office shall assess the amount of funds raised by all fees levied in this chapter and shall make recommendations to the Legislative Research Commission concerning legislative amendments to adjust fee rates as indicated by the assessment.

language of subsection (2) is clearly incorporated into regulatory fee calculation methodology in KRS 238.570(3).

The “odd-numbered year” language appears no fewer than three (3) times in the 2007 amendments to KRS 238.570.

Appellees’ argument that *Armstrong* found that the fund transfers from forty-seven (47) fee-based agency accounts to the general fund did not violate Section 51 of the Kentucky Constitution is not persuasive. The trial court correctly stated the unblemished facts when it observed that “[m]any of these suspensions of statutes, especially those involving the transfer of funds from restricted accounts, are now reenacted in each biennial budget, to the point that many of the statutes codified in the Kentucky Revised Statutes could fairly be characterized as having been effectively repealed...” R.205. (Appellees’ Brief at page 15).

The fact that the suspension at issue in this appeal is but one of many, does not make it any less unconstitutional. The transfer from the charitable game regulatory fund to the general fund is invalid as an unconstitutional suspension of KRS 238.570.

KRS 238.570, by its terms, does not allow the raising of the regulatory fee rate in an even-numbered year. The Appellees assert at page 18 that “the only constitutional requirement is that the fees be set in a manner that their revenue have a reasonable relationship with the costs of the regulation they are designed to cover. And here, KRS 238.570(3) guarantees that requirement will be fulfilled in the context of charitable gaming.” Such an assertion is patently contrary to the plain language of KRS 238.570.

III. KRS 48.315 DOES NOT PERMIT THE TRANSFER OF EXCESS FUNDS FROM THE CHARITABLE GAMING ACCOUNT TO THE GENERAL FUND

In discussing KRS 48.315, the Appellees argue that it was initially enacted in 1984, ten (10) years before the General Assembly passed the Charitable Gaming Act. That is correct, as far as it goes. However, the Appellants have noted at page 18 of their Brief, that there have been a variety of later amendments to KRS 48.315.

Without any legislative history, which would be good to have, the Appellees boldly assert that the reason to include “etc.”³ in KRS 48.315 was so that the General Assembly did not need to be regularly amending the statute; that additional statutes and funds would be coming into existence over time. The Appellees assert, as to KRS 48.315, as follows:

“The General Assembly no doubt recognized that the number and nature of agency funds, special funds, and other funds created under Kentucky statutory law will necessarily change over time. Rather than require constant amendments of KRS 48.315 every two years to account for all newly enacted statutory funds, it is apparent that the General Assembly inserted the term ‘etc.’ to ensure that similar statutory funds enacted in the future would fall within the scope of KRS 48.315. As the Court of Appeals correctly observed, the list of statutes in KRS 48.315(1) is ‘illustrative rather than exhaustive,’ and ‘[t]o hold otherwise would render its inclusion meaningless and nonsensical’ [Opinion, p. 16].” (Appellees Brief, p. 20).

The Court of Appeals and Appellees ignore the plain and clear definition of “etc.”⁴ and the fact that KRS 48.315 has been amended over time on different occasions.

³ Appellees cite to Black’s Law Dictionary for the definition of “etc.”.

⁴ “Where no specific definition is provided for terms contained in the statute, Kentucky law instructs that ‘words of a statute shall be construed according to their common and approved usage In addition, the courts have a duty to accord statutory language its literal meaning unless to do so would lead to an absurd or wholly unreasonable result.’ *Holbrook v. Kentucky Unemployment Ins. Com’n*, 290 S.W.3d 81, 86 (Ky.App. 2009) (quoting *Kentucky Unemployment Ins. Com’n v. Jones*, 809 S.W.2d 715, 716 (Ky.App. 1991); KRS 446.080(4).” Commonwealth, Department of Corrections v. Engle, 302 S.W.3d 60, 64 (Ky. 2010).

Yet, the Appellees adopt the language from *Haydon Bridge*⁵ discussing the sequential enactments of KRS 48.310, .315 and .316. “[l]ooking at the contrasting statutes and considering that KRS 48.315 and KRS 48.316 were enacted together in 1984, and that KRS 48.310(2) was added in 1990, it seems clear that the Legislature intended to retain the statutory authority ‘to suspend’ any statutes ‘dealing with ‘public’ funds.’” *Haydon Bridge*, 304 S.W.3d at 703.

Haydon Bridge should make it clear, as this Court has consistently acknowledged, that the later enactment of or amendment to a statute is evidence of the General Assembly’s awareness of and change to the prior statutory authority. It is a fundamental and primary rule of statutory construction that the enumeration of particular things excludes inclusion of items or things not mentioned. *Smith v. Wedding*, 303 S.W.2d 322, 323 (Ky. 1957).

The Appellees’ footnote at page 21, citing to *Commonwealth v. Louisville Atlantis Community/Adapt, Inc.*, 971 S.W.2d 810, 816 (Ky.App. 1997), posits that “the legislature enacted KRS 48.315 to provide guidance to itself; ‘[b]ecause [KRS 48.315] does not itself prohibit any conduct, the vagueness argument has no applicability.’” Appellants never made a vagueness argument. The statute is not vague. It is crystal clear. KRS 238.570 was not included in the listing of the statutes in KRS 48.315.⁶ KRS

⁵ *Beshear v. Haydon Bridge Company, Inc.*, 304 S.W.3d 682 (Ky. 2010).

⁶ “‘A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.’ *United States v. Plavcak*, 411 F.3d 655, 660 (6th Cir. 2005) (citing *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979)). Thus, we are ‘to ascertain the intention of the legislature from words used in enacting statutes rather than surmising what may have been intended but was not expressed.’ *Stopher v. Conliffe*, 170 S.W.3d 307, 309 (Ky. 2005), overruled on other grounds by *Hodge v. Coleman*, 244 S.W.3d 102 (Ky. 2008).”

48.315 is not authority for the transfer of restricted charitable gaming regulatory funds to the general fund.

IV. THE 2008 INCREASE IN THE KRS 238.570 REGULATORY FEE IS REVIEWABLE

Finally, we get to the fact that Appellees argue that the 2008 fee increase and KRS 238.570 were “abandoned” and not subject to review. As the Appellants noted in their Brief, the parties below agreed to certain stipulations, contained in an Agreed Order, related to the fee increase which would be collected pursuant to KRS 238.570.

(Appellants Brief, pp. 21-22). These stipulations and the Agreed Order are, *de facto*, findings of the trial court. Regardless, the requirement that a trial court should first make findings is one which this Court may waive. Clark Mechanical Contractors, Inc. v. KST Equipment Company, 514 S.W.2d 680 (Ky. 1974). See also Mitchell v. Hadl, 816 S.W.2d 183, 185 (Ky. 1991). The issues have been clearly identified and need not be redefined for this Court to decide the issue.

The increase in the regulatory license fee in an even-numbered year is an issue to which the Appellants may again be subjected, and is an issue which this Court may properly review and rule upon.⁷

ambiguity, ‘there is no need to resort to the rules of statutory construction in interpreting it.’ Stewart v. Estate of Cooper, 102 S.W.3d 913, 915 (Ky. 2003).” Hall v. Hospitality Resources, Inc., 276 S.W.3d 775, 784 (Ky. 2008).

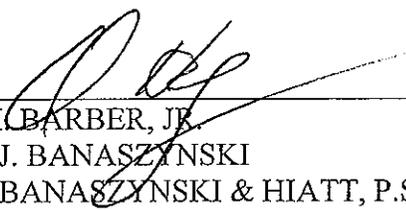
⁷ “This Court has previously recognized that ‘jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one ‘capable of repetition, yet evading review.’ Lexington Herald-Leader Co., Inc. v. Meigs, 660 S.W.2d 658, 661 (Ky. 1983) (quoting Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 546, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976)). That is to say, a technically moot case may nonetheless be adjudicated on its merits where the nature of the controversy is such that ‘the challenged action is too short in duration to be fully litigated prior to its cessation or expiration and . . . there is a reasonable expectation that the same complaining party would be subject to the same action again.’ Philpot v. Paton, 837 S.W.2d 491, 493 (Ky. 1992) (quoting In re Commerce Oil Co., 847 F.2d 291, 293 (6th Cir. 1988)).” Bolton v. Irvin, 373 S.W.3d 432, 434 (Ky. 2012). See also Riley v. Gibson, 338 S.W.3d 230 (Ky. 2011).

CONCLUSION

This Court should reverse the Court of Appeals and confirm the trial court's Order granting the Appellants a declaratory judgment and injunctive relief to prevent the Executive Branch of the Commonwealth and its budget director from enforcing Executive Order 2008-011 and prevent the transfers contained in the 2008-10 biennial budget with respect to DCG regulatory and enforcement funds. This Court should further void the increase in the licensee fee from 0.53% to 0.60%; order a rescission of the increase imposed since July 1, 2008; order a refund or credit to the licensees of the wrongfully collected fee increase.

The General Assembly should not be permitted to use its power to suspend statutes, pursuant to a budget bill, and to effect the transfer from charitable gaming restricted funds to the general fund. When it is allowed to so act, any restricted fund under state control becomes, for all practical purposes, a tax which is deposited into the state's general fund at the sole and unlimited discretion of the General Assembly, notwithstanding constitutional and statutory restrictions.

Respectfully submitted,



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