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Supreme Court of Kentucky

2011-SC-000563-TG

STEVEN L. BESHEAR, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF THE COMMONWEALTH OF KENTUCKY; and MARY LASSITER, IN HER OFFICIAL CAPACITY AS STATE BUDGET DIRECTOR — APPELLANTS

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2011-CA-001687-MR
FRANKLIN CIRCUIT COURT NO. 03-CI-01547

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

OPINION OF THE COURT BY JUSTICE ABRAMSON

REVERSING

Three years ago in *Beshear v. Haydon Bridge Co., Inc.*, 304 S.W.3d 682 (Ky. 2010) (*Haydon Bridge I*), this Court held that provisions of the 2000-2002 and 2002-2004 Budget Bills which suspended annual General Fund appropriations to the Benefit Reserve Fund (BRF) maintained within the Kentucky Workers' Compensation Funding Commission (KWCFC) were constitutional but that other provisions of those bills ordering monies transferred from the BRF to the General Fund and the Department of Mines and Minerals were unconstitutional under Section 51 of the Kentucky

Constitution. This Court reasoned that the monies the legislature had previously appropriated to the BRF and the ongoing private contributions from assessments on workers' compensation insurance premiums were incapable of differentiation, and thus the General Assembly was without authority to transfer any BRF monies to the General Fund absent a statutory amendment and compliance with the publication requirement of Section 51 as set forth in *Commonwealth ex rel. Armstrong v. Collins*, 709 S.W.2d 437 (Ky. 1986). On remand, the trial court granted permanent prospective relief prohibiting the future transfer of funds from the BRF to the General Fund or any other state agency, and also ordered "retroactive injunctive relief" in the form of a judgment requiring Defendants Governor Steven L. Beshear and State Budget Director Mary E. Lassiter to return any and all monies that had been transferred from the BRF to the General Fund in the decade from 2000-2010. The trial court's order addressed not only transfers from the part of the BRF known as the Special Fund but also the Coal Workers' Pneumoconiosis Fund, a separate fund maintained by KWCFC pursuant to Kentucky Revised Statutes (KRS) 342.1241 and .1242 and the focus of new claims brought by Plaintiffs in their Third Amended Complaint. Finally, the trial court held that the Plaintiffs had created a common fund through this litigation and, consequently, their attorneys were entitled pursuant to KRS 412.070 to a 25% contingency fee ($8,778,725.00) to be paid by the Commonwealth of Kentucky.

This Court accepted transfer of the ensuing appeal pursuant to Kentucky Rule of Civil Procedure (CR) 74.02. Defendants/Appellants Beshear and

Lassiter (collectively "the Governor") maintain that sovereign immunity and the separation of powers provisions of the Kentucky Constitution preclude the "retroactive injunctive relief" ordered by the trial court, relief that in essence is an award of damages against the Commonwealth. They also maintain that because no common fund can be created in this case there is no basis for the attorneys' fee award against the Commonwealth. Finally, they contend that the Pneumoconiosis Fund claims should not have been addressed by the trial court since none of the Plaintiffs has standing, never having been subject to the assessments which support that Fund and having no interest in it. Agreeing with the Governor on all of these issues, we reverse the Judgment of the Franklin Circuit Court.

RELEVANT FACTS

I. The Original Suit and *Haydon Bridge I.*

In December 2003 and February 2004, respectively, Plaintiffs Haydon Bridge Company, Inc., Greater Louisville Auto Dealers Association, Kentucky Automobile Dealers Association, M&M Cartage Co., Inc., Springfield Laundry & Dry Cleaners, Inc. and Usher Transport, Inc. (Plaintiffs) filed first a Petition for Declaration of Rights and Injunctive Relief and later a First Amended Petition against then-Governor Paul Patton and Acting State Budget Director Mary Lassiter. Plaintiffs challenged the Governor's budget reduction plan and corresponding parts of the 2000-2002 and 2002-2004 Budget Bills that affected the Special Fund portion of the BRF. The Special Fund, originally created in 1946, is addressed in KRS 342.122 and is funded through two

sources, appropriations by the General Assembly and assessments against workers' compensation premiums paid by Kentucky employers such as the Plaintiffs. The original and First Amended Petitions (and an eventual Second Amended Petition naming then-Governor Ernie Fletcher) sought a declaration that provisions in the aforementioned budget bills, which (1) temporarily suspended an annual $19 million appropriation from the General Fund to the KWCFC and (2) ordered transfers out of the Special Fund to either the General Fund or the Department of Mines and Minerals, were unconstitutional. The trial court invalidated all of the challenged budget provisions under Section 51 of the Kentucky Constitution.

As noted above, this Court found suspension of the appropriations to be constitutional under Sections 15 and 51 of the Kentucky Constitution[1] but agreed with Plaintiffs that transfer of funds *out of* the Special Fund[2] was unconstitutional. This Court reasoned that KRS 342.1227 prohibited funds in the possession of KWCFC from being transferred or loaned to the

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[1] Section 15 provides: "No power to suspend laws shall be exercised unless by the General Assembly or its authority."

Section 51 provides: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and *no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be reenacted and published at length.*" The emphasized portion of this section is referred to as the "publication requirement."

[2] In *Haydon Bridge I*, the Court referred to the Benefit Reserve Fund (BRF) as the focus of the Plaintiffs' claims but, in fact, all of their petitions addressed only the Special Fund portion of the BRF created under KRS 342.122. The separate Pneumoconiosis Fund created in KRS 342.1241 and .1242 was not the subject of Plaintiffs' claims until the filing of an Third Amended Petition in June 2010, following this Court's *Haydon Bridge I* opinion. The effect of *Haydon Bridge I* on the Pneumoconiosis Fund is discussed more fully below.

Commonwealth for any purpose other than those authorized by KRS Chapter 342. While the General Assembly in KRS 48.310(2) and 48.315 provided that a budget bill could be used to transfer KWCFC funds back to the General Fund, those transfers were necessarily limited by this Court's holding in *Armstrong v. Collins*, 709 S.W.2d at 437. *Armstrong* held that the legislature had no authority, via a budget bill, to transfer back to the General Fund any agency funds in which legislative appropriations and private contributions were commingled and not subject to differentiation. In *Haydon Bridge I*, we concluded that monies in the Special Fund could not be differentiated and thus the attempted statutory suspension of KRS 342.1227 was improper under Section 15 of the Kentucky Constitution; in fact, a statutory amendment was necessary, necessitating compliance with the publication requirement of Section 51. Because there was no compliance with Section 51, the challenged transfers from the agency funds to the General Fund and the Department of Mines and Minerals were unconstitutional.

II. The Trial Court's Orders on Remand and This Appeal.

On remand, Plaintiffs were allowed to file a Third Amended Complaint challenging provisions in the 2004-2006, 2006-2008 and 2008-2010 Budget Bills that were similar to those held unconstitutional in *Haydon Bridge I* and adding new claims regarding provisions in budget bills dating back to 2000 which pertain to the Pneumoconiosis Fund. The Pneumoconiosis Fund was created in 1996 for the benefit of coal industry workers whose last exposure occurred on or after December 12, 1996 and is funded solely by "employers

engaged in the severance or processing of coal." KRS 342.1242. The funding comes from an assessment on the workers' compensation premiums paid by the coal industry employers and a per ton assessment on coal severed by those entities engaged in coal severance. *Id.* The challenged budget bill provisions transferred monies from the Pneumoconiosis Fund to the Office of Mine Safety and Licensing. In their Third Amended Complaint, Plaintiffs once again characterized the relief sought as declaratory and injunctive relief. The injunctive relief was partially "retroactive" in that it sought the return of all funds transferred out of the Special Fund from 2000-2010 and out of the Pneumoconiosis Fund in the same timeframe. Plaintiffs also sought prospective injunctive relief as to upcoming transfers from the Pneumoconiosis Fund for the 2010-2012 biennium.

Over numerous objections from the Governor, detailed below, the trial court granted retroactive injunctive relief as to both Funds and prospective relief as to both Funds. As for the Pneumoconiosis Fund, an earlier restraining order had halted a planned transfer from that Fund to the Office of Mine Safety and Licensing as provided for in the 2010-12 Budget Bill. That temporary order became permanent when the trial court issued its August 16, 2011 permanent injunction. The trial court also granted attorneys' fees to the Plaintiffs' counsel, finding that their efforts had created a "common fund" that benefited other Kentucky employers who paid assessments to the KWCFC and reasoning that 25% of that common fund should be awarded as fees pursuant to KRS 412.070.

After the trial court entered judgment, the KWCFC Director of Fiscal Operations filed an affidavit establishing that the amounts transferred either to the General Fund or the Department of Mines and Minerals from 2000-2010 totaled $32,781,000.00. The Director did not differentiate between the Special Fund and Pneumoconiosis Fund, referring to them collectively as the Benefit Reserve Fund. However, the Director did note that a scheduled transfer from "the Benefit Reserve Fund of coal workers pneumoconiosis funds in the amount of $1,904,000 to the Department of Mines, Safety and Licensing" did not occur "due to orders issued by Franklin Circuit Court enjoining such transfer."

The Governor appealed the grant of prospective injunctive relief as to the intended transfers from the Pneumoconiosis Fund and the retroactive relief regarding transfers made from 2000-2010. Having accepted transfer from the Court of Appeals, the trial court's judgment is before us for review in all respects except as to the permanent prospective injunctive relief prohibiting transfers from the Special Fund, relief that the Governor concedes is consistent with the directive of this Court in *Haydon Bridge I.*

ANALYSIS

I. Sovereign Immunity Precludes the Monetary Relief Ordered by the Court.

As we recently noted in *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 799 (Ky. 2009), sovereign immunity is a common law doctrine, a "bedrock component" of American government, which prohibits claims "against the government treasury absent the consent of

the sovereign." In *Reyes v. Hardin County*, 55 S.W.3d 337, 338-39 (Ky. 2001), this Court succinctly described the interplay between the doctrine and Sections 230 and 231 of our Kentucky Constitution:

> [Sovereign immunity] was first recognized by our predecessor Court without question or citation to authority in *Divine v. Harvie*, 23 Ky. (7 T.B. Mon.) 439 (1828): 'It seems to be conceded on all hands, that the State cannot be made a party defendant, and is not suable in her own courts.' *Id.* at 441. The words 'sovereign immunity' are not found in our Constitution. However, Section 230 provides that "[n]o money shall be drawn from the State Treasury, except in pursuance of appropriations made by law . . .;' and Section 231 provides that '[t]he General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.' Virtually identical provisions were contained in the Constitutions of 1792 (Article VIII, §§ 3, 4), 1799 (Article VI, §§ 5, 6), and 1850 (Article VIII, §§ 5, 6). Although some cases suggest that Sections 230 and 231 are the source of sovereign immunity in Kentucky, *e.g.*, *Bach v. Bach*, Ky., 288 S.W.2d 52, 54 (1956), those sections are more accurately viewed as delegating to the General Assembly the authority to waive the Commonwealth's inherent immunity by direct appropriation of money from the state treasury and/or by specifying where and in what manner the Commonwealth may be sued.

Just as the State Auditor and State Treasurer could not be sued in lieu of the Commonwealth in *Divine v. Harvie* to obtain a garnishment against the State Treasury, several decades later this Court held that a suit demanding funds held in the State Treasury could not be maintained under the pretext of a suit against the treasurer. *Tate v. Salmon*, 79 Ky. 540, 543 (Ky. 1881). Sovereign immunity is an indisputable limitation on the power of the judiciary. As noted in *Withers v. University of Kentucky*, 939 S.W.2d 340, 344 (Ky. 1997), a "court has no right to merely refuse to apply it or abrogate the legal doctrine."

The Governor insists that the relief ordered by the trial court is a latter day effort to ignore sovereign immunity under the pretext of a retroactive injunction while Plaintiffs insist that the retroactive injunction flows as the obvious remedy for the constitutional violations identified in *Haydon Bridge I.* Despite the current diametrically opposed positions on the most recent trial court orders, there is no question that Plaintiffs' declaratory and injunctive claims, as originally pled, did not impinge on sovereign immunity.

The Commonwealth, in this case represented by the Governor, is clearly subject to a traditional declaratory judgment action. As this Court noted in *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992), any suggestion that the Commonwealth was immune from lawsuits seeking a declaration "that the General Assembly . . . has acted or failed to act in a constitutional manner" was "put . . . to rest" by *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989), the landmark public education case.

> *Rose* held the General Assembly is not immune from suit in a declaratory judgment action to decide whether the General Assembly has failed to carry out a constitutional mandate and that members of the General Assembly are not immune from declaratory relief of this nature simply because they are acting in their official capacity. *Rose* held a declaratory judgment over constitutionality is not limited to deciding the constitutionality of statutes, but extends to failure to enact statutes complying with constitutional mandate. While it would be a violation of the separation of powers doctrine in the Kentucky Constitution, Sections 27 and 28, for our Court to tell the General Assembly what to do, *i.e.*, what system or rules to enact, it is our constitutional responsibility to tell them whether the system in place complies with or violates a constitutional mandate, and, if it violates the constitutional mandate, to tell them what is the

> constitutional "minimum." But by its very nature, judicial exercise of this responsibility requires great restraint.

837 S.W.2d at 493-94.

Three years earlier, in *Armstrong*, 709 S.W.2d 437, the 1986 case which pitted the Attorney General against Governor Martha Layne Collins, the Secretary of the Finance Cabinet and the State Treasurer in a dispute over provisions in the biennial budget bill passed in 1984, the trial court had temporarily restrained transfers from certain "trust and agency" funds. Although the trial court subsequently concluded the transfers were constitutional, this Court later reversed the trial court's legal conclusion in part, *i.e.*, some of the transfers were deemed constitutional while others were unconstitutional, but there was no directive that the improperly transferred funds be restored. Because *Armstrong* was critical to *Haydon Bridge I*, its central holding bears repeating:

> [T]he General Assembly has, constitutionally speaking, the power in a budget bill to *repeal* or *amend* the manner in which public funds are used. Ky. Const. Sec. 51, the "title" section, has not been violated by the matters clearly relating to appropriations. What we decide is simply that the transfers of funds which are merely temporary, determinable suspensions of the operation of the statutes relating to appropriations of public funds are within the legislative authority as set out in SB 294 and Ky. Const. Sec. 51, the amendment section.
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> However, the transfers of funds which relate to appropriations of private contributions cannot be termed suspensions or modifications of the operation of the statutes. Because the General Assembly has no authority to transfer private funds to the general fund, the transfer of money from agencies in which public funds and private employee contributions are commingled, and cannot be differentiated, is unconstitutional.

709 S.W.2d at 446 (emphasis in original). The *Armstrong* Court identified state retirement plans such as the Kentucky Employees Retirement System and the Teachers' Retirement System as well as the "Workers' Compensation and Workers' Claim Special Fund" as examples of state agencies with commingled funds. *Id.* at 446-47. "The employee contributions and the insurance company assessments constitute private, mandatory donations."[3] *Id.* at 447.

In the case before us, the Governor has not appealed the portion of the trial court's order which would enjoin prospective transfers from the Special Fund to the General Fund or other state agencies. Indeed, the law of the case in *Haydon Bridge I* would require that very result. The only part of the court's prospective injunctive relief that is before us relates to enjoining transfers from the Pneumoconiosis Fund, and the basis of the Governor's appeal is Plaintiffs' alleged lack of standing, a matter discussed below. Thus, the retroactive injunctive relief is really the centerpiece of this dispute.

Sovereign immunity is both broad and exacting and if the sovereign has not waived immunity or consented to suit an injunction is foreclosed in most circumstances. One recognized exception identified in *Board of Trustees of the Univ. of Ky. v. Hayse*, 782 S.W.2d 609 (Ky. 1989) *overruled on other grounds by Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), derives from *Ex parte Young*, 209 U.S. 123 (1908). Pursuant to the *Young* exception, a federal court may grant

[3] Notably, these commingled funds were used to fund Kentucky public employees' pensions, in the case of the retirement systems, and workers' compensation payments, with regard to the other mentioned funds. All of the funds were created for the benefit of private individuals as opposed to general governmental purposes.

prospective injunctive relief against a state officer to compel compliance with federal law, whether constitutional or statutory. However, the exception is not applicable to an action directly against the state or state agency, only against a state officer, and it cannot be used to compel a state officer to comply with state law. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004). As discussed below, however, prospective injunctive powers are available to Kentucky courts in cases such as this and those powers include both temporary relief pending a declaration of unconstitutionality under the Kentucky Constitution as well as permanent relief in a final judgment. With those general observations, we turn to the trial court's grant of retroactive injunctive relief.

Plaintiffs insist that the retroactive injunctive relief awarded by the trial court is a "remedy that flows inexorably from this Court's declaration of constitutional wrong in *Haydon Bridge [I]*" and is not barred by sovereign immunity. They contend that the refund provisions of KRS 45.111 apply to waive sovereign immunity in these circumstances; sovereign immunity only protects the "public purse" and the KWCF funds are not state money; the injunctive relief ordering repayment is not an award of money damages; and Section 242 of the Kentucky Constitution waives immunity when private property is improperly taken by the Commonwealth. Having considered each of these theories, we conclude that none of them overcomes or displaces sovereign immunity.

A. KRS 45.111 and *Ross v. Gross*.

KRS 45.111 provides:

> Any funds received into the State Treasury which are later determined not to be due to the state may be refunded to the person who paid such funds into the Treasury. The Finance and Administration Cabinet may issue a warrant to disburse the funds upon a request from the budget unit that originally received and deposited the funds. The request for refund must be approved by the head of the budget unit or his designated assistant. The Finance and Administration Cabinet may require any documentation deemed necessary.

On its face, the statute contemplates that the budget unit that received funds "not . . . due to the state" will process a refund request through the Finance and Administration Cabinet. Although this statute appears never to have been cited in a published Kentucky case, an obvious example of the statute at work would be the refund of an overpayment of a state licensing fee. In this case, Plaintiffs' workers' compensation insurance premiums were lawfully subject to assessment pursuant to KRS 342.122 and those assessments were literally "due to the state" with the designated agency recipient being the KWCFC, "an agency of the Commonwealth [created] for the public purpose of controlling, investing, and managing the funds collected pursuant to KRS 342.122." KRS 342.1223. Thus, there is no credible argument that KRS 45.111 applies to these facts. For the statute to apply, the funds would have to "not . . . be due to the state" (and they are legally due) and the refund would have to be due to the paying party (in this case the Plaintiffs) but there is no request, nor could there be, that the funds be restored to private parties. Instead, Plaintiffs

request restoration of the funds to the BRF; in short, they are requesting an intra-governmental transfer from the General Fund back to the BRF.

A case relied on by the trial court, *Ross v. Gross*, 300 Ky. 337, 188 S.W.2d 475 (1945), predated KRS 45.111 but addressed the same concept, *i.e.*, refund of monies not due the state. That case involved fees and receipts collected by the Harlan County jailer, county court clerk and sheriff and remitted to the State Treasury pursuant to a statute applicable to counties having a population of more than 75,000 people. The Harlan County officials remitting these fees were to be paid their salaries through the State Treasury. When it was later determined that Harlan County had fewer than 75,000 residents and the statute did not apply, the monies were ordered refunded on the ground that payment into the State Treasury did not vest the state with right or title since the monies "belonged" at all times to Harlan County. 188 S.W.2d 475. The *Ross* Court opined that the "true owner" of money placed in the Treasury need not "await the pleasure of the Legislature in order to recover that which [has] been adjudged by a Court of competent jurisdiction to have been at all times his own." *Id.* Notably, the concept of sovereign immunity does not appear to have been raised in *Ross*, but equally importantly, as in KRS 45.111, the refund concept is one applicable when a person pays monies into the State Treasury that are not owed to the state. Again, Plaintiffs' assessments were lawfully owed to the Commonwealth through its statutorily-created agency, the KWCFC, and this case is not seeking a refund to private

payors (or to county officials, as in *Ross*) but rather restoration of monies to a particular state agency fund.[4]

Recognizing that they are not seeking return of their own assessments but rather return of Fund monies to the KWCFC, Plaintiffs characterize those monies as private funds held in trust, a premise for which no authority is cited and which is not borne out by review of KRS Chapter 342. While there are undoubtedly restrictions on the use of Fund monies, *e.g.*, KRS 342.1227, there is no reference in the statute to the creation of a "trust." Moreover, although the KWCFC is required to "act as a fiduciary" in exercising its power over the funds collected, KRS 342.1223(2)(b), that does not make KWCFC monies a trust corpus.[5] Finally, *Haydon Bridge I* held that Special Fund monies could not be transferred to the General Fund through the challenged budget bill

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[4] Plaintiffs cite several out-of-state cases in support of their position but each is readily distinguishable. *Bill Stroop Roofing, Inc. v. Metropolitan Dade County*, 788 So.2d 365, 366 (Fl. Ct. App. 2001), involved licensing fees "illegally extracted" in violation of a state statute and *River Fleets, Inc. v. Carter*, 990 S.W.2d 75 (Mo. Ct. App. 1999), involved surcharge fees wrongfully collected for an underground storage tank insurance fund. In *Santos v. Ohio Bureau of Workers' Compensation*, 801 N.E.2d 441 (Ohio 2004), addressing improperly collected subrogation fund fees, the court held that the employers were entitled to restitution, *i.e.*, to have restored to them the funds in the defendant's possession that had been improperly collected and that rightfully belonged to the employers. All three cases involved monies that were improperly collected and thus not due the governmental body that held them. These cases are obviously comparable to refunds sought under KRS 45.111 for monies "not . . . due the state." Here, Plaintiffs' workers' compensation premium assessments were indisputably lawfully assessed and this case is not about having those funds restored to the employers but rather about how the legislative branch subsequently dealt with a fund that contained those private assessments as well as funds appropriated from the General Fund.

[5] Interestingly, KRS 342.1224 provides that members of the board of directors of the KWCFC "are hereby determined to be officers and agents of the Commonwealth of Kentucky and, as such, shall enjoy the same immunities from suit for the performance of their official acts as do other officers of the Commonwealth of Kentucky."

provisions because it was impossible to differentiate the source of the funds held—funds appropriated by the legislature, employers' assessments or investment income. 304 S.W.3d at 704-05. In short, there was a commingling of public and private monies in the account of a Kentucky governmental agency. To now deem those agency funds exclusively private would not only be contrary to the statute but contrary to the facts on which this Court based its legal conclusions in *Haydon Bridge I.*

In sum, while the refund provisions of KRS 45.111 constitute a limited waiver of sovereign immunity, that statute applies to funds not "due to the state" and the funds at issue here were literally due to the Commonwealth through a state agency, KWCFC. As for *Ross v. Gross*, it never addressed sovereign immunity so it is impossible to know if the issue was raised but, in any event, it too applies to funds that are not due the State Treasury. In the end, Plaintiffs focus on the KWCFC Funds as the "refund" sought (not their own individual assessments), an issue that is best addressed in the context of their "public purse" argument.

B. The Public Purse.

Sovereign immunity protects public coffers or, as it is sometimes denominated, the public purse. The parties have contested whether the essence of the challenged transfers is, as the Governor maintains, merely an intra-governmental transfer between accounts (the BRF to the General Fund) held by the State Treasury. Plaintiffs maintain the monies at issue are not part of the State Treasury and therefore not part of the public purse. This

argument ties closely to the prior argument that the monies to be refunded never really belonged to the Commonwealth.

Clearly, KRS 45.253(3) provides that "agency accounts," which KWCFC monies would be, are to be deposited with the State Treasury. The State Treasurer's Annual Reports for 2001 through 2010, available at http://finance.ky.gov confirm that the KWCFC's BRF is part of the State Treasury. Plaintiffs counter that KWCFC funds can be and are invested in equity securities, KRS 342.1223(2)(b), an investment prohibited to the State Treasury. Even so, it is inescapable that the Funds managed by the KWCFC are public agency funds. KRS 342.122;.1223;.1224. Our holding in *Haydon Bridge I* simply established that within the Special Fund it is impossible to differentiate the *source* of given monies, *i.e.*, whether derived from legislative appropriations, assessments or investment income. To the extent we referred to monies as "private agency funds," that denomination was not intended to suggest that the state agency in charge, the KWCFC, had no control over those funds or that the funds were exclusively private but rather that they were strictly controlled by statute and included "private mandatory donations" as referenced in *Armstrong*.[6] Again, the issue in *Haydon Bridge I* was not that the

[6] Plaintiffs offer *Wisconsin Medical Society, Inc. v. Morgan*, 328 Wis. 469, 787 N.W.2d 22 (2010) as directly analogous to this case but it is factually and legally distinguishable. There the Injured Patients and Families Compensation Fund was created as part of a statutory scheme that constitutes the exclusive source of recovery for a person claiming malpractice by a health care provider in Wisconsin. Providers are required to purchase malpractice coverage and then pay an annual assessment on their premiums to the Fund which in turn pays any malpractice award or settlement that exceeds the provider's own insurance coverage. By statute, the Fund is an *irrevocable trust* held for the benefit of health care providers and claimants. It is

relevant provisions of KRS Chapter 342 could never be changed by the General Assembly to re-purpose any portion of the commingled public monies managed by the KWCFC but that the statutes could not be changed through the suspension powers recognized in Section 15 of our Constitution.[7] 304 S.W.3d at 704-05.

C. Retroactive Injunctive Relief.

In an effort to avoid the sovereign immunity doctrine, Plaintiffs insist that their requested retroactive injunctive relief is not a disguised request for damages but a proper remedy for the state's unconstitutional transfers of KWCFC monies. In response, the Governor maintains that a retroactive injunction is an oxymoron, injunctive relief being exclusively a prospective remedy. In fact, the law, albeit infrequently, recognizes a form of retroactive injunction more aptly referred to as a "reparative injunction," "[a]n injunction requiring the defendant to restore the plaintiff to the position that the plaintiff occupied before the defendant committed a wrong." BLACK'S LAW DICTIONARY (9th ed. 2009). The term appears rarely in American jurisprudence but whatever its

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purely privately funded. Thus, the Wisconsin Supreme Court, in a 5-2 decision, concluded that sweeping the Fund of $200 million for the benefit of an indigent care fund was an unconstitutional taking of the health care providers' property interests in the Fund. This case does not involve an irrevocable trust and it is not about exclusively private assessments but rather commingled funds. *See also Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Ass'n.*, 159 N.H. 627, 992 A.2d 624 (2010) (Fund for the payment of medical malpractice awards could not be used to supplement state's General Fund; the Fund was purely privately funded and was not a state agency).

[7] The concurring in result opinion suggests that the majority, in discussing *Haydon Bridge I*, intimates that private assessments can be lawfully taken by the legislature for General Fund purposes. Respectfully, that proposition is not expressly or impliedly stated anywhere in this Opinion and certainly is not intended.

vitality in other contexts, it has no role in this case due to the Commonwealth's sovereign immunity. Almost forty years ago, in *Edelman v. Jordan*, 415 U.S. 651 (1974), the United States Supreme Court explained this very point in the Eleventh Amendment context. The Eleventh Amendment, of course, recognizes that states joining the Union did not surrender their sovereign immunity.[8]

In *Edelman*, a class of individuals who were entitled to benefits under a joint federal and state program known as Aid to the Aged, Blind, and Disabled (AABD), brought suit alleging that Illinois officials were violating federal law and denying equal protection by not complying with federal law time limits within which AABD applications were to be processed. They sought and secured both declaratory and injunctive relief from the federal district court. The court not only granted prospective injunctive relief requiring future compliance with federal time limits but also ordered Illinois state officials to "release and remit AABD benefits [that had been] wrongfully withheld" from individuals who were later determined to be eligible. 415 U.S. at 656. The

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[8] "Dual sovereignty is a defining feature of our Nation's constitutional blueprint. States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union "with their sovereignty intact." An integral component of that "residuary and inviolable sovereignty," retained by the States is their immunity from private suits. . . . States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government. Nevertheless, the Convention did not disturb States' immunity from private suits, thus firmly enshrining the principle in our constitutional framework.

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[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity. *Federal Maritime Comm. v. S. Carolina State Ports Authority*, 535 U.S. 743, 751-53 (2002) (internal citations omitted).

United States Court of Appeals for the Seventh Circuit affirmed, rejecting Illinois officials' argument that the Eleventh Amendment precluded retroactive monetary relief.

In reversing, the U. S. Supreme Court noted that while the Eleventh Amendment only literally precludes the federal courts from entertaining a suit "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," that Court has long recognized that "an unconsenting State is immune from suits brought in federal courts by her own citizens" as well as citizens of other states or foreign nationals. 415 U.S. at 662-63. The *Edelman* Court further noted that "(W)hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.*, citing *Ford Mtr. Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945). Explaining the distinction between the prospective and the retroactive portions of the injunction entered by the district court, the Supreme Court stated:

> *Ex parte Young* was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution.
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> But the relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment. Such relief is analogous to that awarded by the District Court in the prospective portion of its order under review in this case.