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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001642-MR

CHARLIE COLEMAN, JOHN P. ROTH JR. AND ERIK HERMES — APPELLANTS

v.

APPEAL FROM
CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 12-CI-00089

CAMPBELL COUNTY LIBRARY BOARD OF TRUSTEES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CLAYTON, AND D. LAMBERT, JUDGES.

CLAYTON, JUDGE: Charlie Coleman, John P. Roth Jr. and Erik Hermes (hereinafter "the taxpayers") bring this appeal from the Campbell Circuit Court's grant of summary judgment to the Campbell County Library Board of Trustees (hereinafter "the Board"). The primary issue is whether the holding of an opinion (hereinafter "the Opinion") of the Court of Appeals, which harmonized statutes relating to public library ad

valorem tax rates, is to be applied retroactively or prospectively only.

In *Campbell Cty. Library Bd. of Trustees v. Coleman*, 475 S.W.3d 40, 41 (Ky. App. 2015), *disc. review denied* (Dec. 10, 2015), a panel of this Court addressed whether public libraries in Kentucky, created by petition pursuant to Kentucky Revised Statutes (KRS) 173.710 *et seq.*, should assess the library's ad valorem tax rate in accordance with KRS 132.023 or KRS 173.790. The underlying class action, brought by a group of taxpayers in the Campbell Circuit Court,[1] sought recovery of what they maintained were unlawfully excessive ad valorem taxes levied by the Campbell County Library Board. According to the taxpayers, the Board had erroneously calculated its ad valorem rate each year according to the provisions of KRS 132.023, which allows a taxing district to increase revenue from ad valorem taxes up to four percent without triggering a reconsideration by the district or voter recall referendum, when in fact it should have applied KRS 173.790, which only allows an increase in the tax rate via a petition signed by fifty-one percent of duly qualified voters in the district. The circuit court

[1] A similar action was also brought by a group of taxpayers in Kenton County. The Kenton Circuit Court ruled that KRS 173.790 was the controlling statute and that the Kenton County Library Board had improperly relied upon KRS 132.023 to increase the ad valorem tax rate. The circuit court denied the plaintiffs a refund for "overpaid" ad valorem taxes. In the first appeal to this Court, the Kenton County case was consolidated with the Campbell County case. The Kenton County plaintiffs are not parties to the present appeal.

entered summary judgment for the taxpayers, ruling that the Board is required to comply with KRS 173.790, as the more specific statute, in setting its annual tax rate. The Board appealed. The Court of Appeals panel reversed the circuit court, concluding that

> KRS 132.023 and KRS 173.790 are both applicable to ad valorem taxing rates of a library taxing district formed by petition under KRS 173.720 and can be harmoniously interpreted to complement each other. KRS 132.023 generally controls the ad valorem tax rate assessed by a library taxing district formed by petition; however, KRS 173.790 is triggered if the library seeks to increase revenue from ad valorem taxes above 4 percent of the revenue generated from the compensating tax rate as set forth in KRS 132.023(1) and (3). Our construction of KRS 132.023 and KRS 173.790 gives effect to both statutes and honors what we believe the General Assembly intended.

Campbell Cty. Library Bd., 475 S.W.3d at 47-48.

The case was remanded for proceedings consistent with the Opinion. The Kentucky Supreme Court denied the taxpayer's motion for discretionary review.

The Board moved for summary judgment on the remaining counts of the taxpayers' complaint. The taxpayers filed a cross-motion for summary judgment. The circuit court entered an agreed order limiting briefing solely to the issue of whether the Opinion should be applied retroactively or prospectively only. Following a hearing, the circuit court entered an order

in which it applied the three-factor test for retroactivity set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106, 92 S. Ct. 349, 355, 30 L. Ed. 2d 296 (1971) *disapproved of by Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993), to hold that the Opinion harmonizing KRS 173.790 and KRS 132.023 was intended to be applied prospectively only. The taxpayers filed a motion to amend, alter or vacate the order. The motion was denied and this appeal by the taxpayers followed.

The taxpayers raise four arguments: (1) that the circuit court order is contrary to the Opinion and violates the law-of-the-case doctrine; (2) federal due process and Kentucky law require the taxpayers to be provided with meaningful retroactive relief; (3) the order renders KRS 173.790 ineffective for periods prior to the Opinion, thereby violating Kentucky's separation of powers doctrine and; (4) even if prospective-only application was possible in this case, the circuit court erred in finding it justified here.

I. Whether the circuit court's order is contrary to the Opinion and violates the law-of-the-case doctrine; and whether the Board waived the issue of prospective-only application

The taxpayers' first argument questions the trial court's authority to determine that the Opinion is to be applied prospectively only. Because the Opinion does not expressly state that its holding is to be given prospective-only application, they contend the holding

must apply both retroactively and prospectively, and, in the absence of any petition for rehearing or modification by the Board, this retroactive application has become the law of the case. "The law-of-the-case doctrine describes a principle which requires obedience to appellate court decisions in all subsequent stages of litigation. Thus, on remand, a trial court must strictly follow the mandate given by an appellate court in that case." *Buckley v. Wilson*, 177 S.W.3d 778, 781 (Ky. 2005) (footnotes omitted). "Upon receipt of an appellate court opinion, a party must determine whether he objects to any part of it and if he does, petition for rehearing or modification or move for discretionary review. Upon failure to take such procedural steps, a party will thereafter be bound by the entire opinion." *Williamson v. Commonwealth*, 767 S.W.2d 323, 326 (Ky. 1989).

The pertinent portion of the Opinion states that "the Campbell and Kenton Circuit Courts erred as a matter of law by concluding that KRS 132.023 was inapplicable to library districts formed by petition and erred by rendering the respective summary judgments so concluding. We hold that KRS 132.023 and KRS 173.790 are both applicable to library districts formed by petition and can be harmonized in their application as set out in this Opinion." *Campbell Cty. Library Bd.*, 475 S.W.3d at 48. The Opinion reverses the summary judgments and remands "for proceedings consistent with this Opinion[.]" *Id.*

The Board argues that statements elsewhere in the Opinion do expressly and unmistakably direct a prospective-only application of the Court's holding,

specifically the following passage discussing the principles of *Wayne Public Library Board of Trustees v. Wayne County Fiscal Court*, 572 S.W.2d 858 (Ky. 1978):

> In *Wayne*, the Supreme Court addressed a second attack on the constitutionality of the provisions of KRS Chapter 173 as pertains to the petition method of forming public library districts in Kentucky. As noted, that legislation was enacted in 1964. In upholding the statutes, the Supreme Court in *Wayne* noted that "[w]hen over two-thirds of the library districts in Kentucky are the children of these statutes, there can be no doubt that many important and valuable rights, obligations and services have vested." *Id.* at 859. That same logical common sense approach is also applicable to these cases now on appeal, notwithstanding that this Court has harmonized the statutes at issue.

Campbell Cty. Library Bd., 475 S.W.3d at 48.

Although this passage may articulate policy grounds to support a prospective-only application, it does not provide an unambiguous directive to that effect.

The taxpayers argue that when an appellate opinion is silent, the silence speaks for retroactive application only and any contrary intention must be manifest. Kentucky jurisprudence "generally embrace[s] the idea that although legislation may only apply prospectively, judicial decisions generally apply retroactively." *Branham v. Stewart*, 307 S.W.3d 94, 102 (Ky. 2010)

(citing *United States v. Security Industrial Bank*, 459 U.S. 70, 79, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982)). The taxpayers also rely on an opinion of the United States Supreme Court, *Harper*, *supra*, which states that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule." 509 U.S. at 97, 113 S.Ct. at 2517. But *Harper* is limited to the application of federal law only, and expressly acknowledges that state courts may fashion their own rules of retroactivity regarding state law. "Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law, cannot extend to their interpretations of federal law." *Id.*, 509 U.S. at 100, 113 S. Ct. at 2519 (citing *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-66, 53 S.Ct. 145, 148-49, 77 L.Ed. 360 (1932)) (internal citation omitted). Furthermore, *Harper* stands only for the proposition that, once a rule of federal law is applied to the parties in the case in which it was announced, it must be applied retroactively. It does not address whether a newly-announced decision need be applied to the parties in the instant case. *McKinney v. Pate*, 20 F.3d 1550, 1565-66 (11th Cir. 1994).

The Opinion in this case did not expressly decide the issue of retroactive or prospective applicability, and directed the case back to the trial court for further proceedings. "[I]t was the trial court's duty to interpret

and apply the controlling appellate court decision." *Buckley v. Wilson*, 177 S.W.3d 778, 781 (Ky. 2005) (footnote omitted). Under Kentucky law, the circuit court possessed the discretion on remand to make the retroactivity determination:

> The scope of a lower court's authority on remand of a case is not measured in terms of its jurisdiction, but by the direction or discretion contained in the appellate court's mandate. An appellate court might direct a trial court, such as by ordering a new trial or the dismissal of charges. With such a mandate, the trial court's authority is only broad enough to carry out that specific direction. Alternatively, and as is very often the case when the appellate court reverses a trial court, it simply grants the trial court the discretion to conduct further proceedings not inconsistent with the opinion. In such cases, . . . the general principle is stated as follows:
>
> > The trial court may take such action, not inconsistent with the decision of the appellate court, as in its judgment law and justice require, where the case has been remanded generally without directions, or for further proceedings, or for further proceedings in accordance, or not inconsistent, with the opinion.
>
> 5 C.J.S. *Appeal and Error* § 978 at 481-83 (1993) *citing Pieck v. Carran*, 289 Ky. 110, 157 S.W.2d 744 (1941).

Hutson v. Commonwealth, 215 S.W.3d 708, 713-14 (Ky. App. 2006).

Thus, the circuit court's action in deciding that the Opinion was to be applied prospectively only was well within the scope of its authority and discretion. Consequently, its order did not violate the law of the case doctrine. Furthermore, under these circumstances, the issue of retroactive applicability was not waived by the Board because the Opinion left the resolution of this issue to the circuit court.

II. Whether federal due process and Kentucky law require the provision of retroactive relief to the taxpayers

The taxpayers further argue that applying the Opinion prospectively only violates federal and state due process guarantees. "Since the collection of a tax constitutes a deprivation of property, federal due process standards require state and local governments to offer taxpayers procedural safeguards against 'unlawful exactions.'" *Phillips v. Commonwealth*, 324 S.W.3d 741, 743 (Ky. App. 2010) (quoting *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990)). Governments may meet this requirement by offering taxpayers one of three possible recourses: (1) a pre-deprivation remedy, which permits the taxpayer a meaningful opportunity to withhold the tax and to dispute the amount owed; (2) a post-deprivation remedy, which allows taxpayers to challenge the amount paid and to obtain a

refund if it is determined that the tax was wrongfully collected; or (3) a combination of both. *Id.* at 743-44 (citing *McKesson* 496 U.S. at 36-37, 110 S.Ct. at 2250). In Kentucky, a post-deprivation remedy is found in KRS 134.590, a post-deprivation remedy which provides for a refund of ad valorem taxes when no taxes were due or were paid under a statute held unconstitutional.

In addressing this issue in its order denying the taxpayers' motion to amend, alter or vacate, the circuit court held that the due process protections apply exclusively to those who have paid tax pursuant to a statute subsequently found to be unconstitutional, as in *McKesson*. The taxpayers correctly contend that the taxation need not be pursuant to an unconstitutional statute to trigger due process protections, citing *Reich v. Collins*, 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994) and *Newsweek, Inc. v. Fla. Dep't of Revenue*, 522 U.S. 442, 118 S.Ct. 904, 139 L.Ed.2d 888 (1998).

But our case law also provides that due process protections may be balanced against considerations of good-faith reliance and equity.

> It is within the inherent power of a Court to give a decision prospective or retrospective application. It is further permissible to have a decision apply prospectively in order to avoid injustice or hardship. This is true where property rights are involved and parties have acted in reliance on the law as it existed, and a contrary result would be unconscionable.

Hagan v. Farris, 807 S.W.2d 488, 490 (Ky. 1991) (internal citations omitted). "[W]hen a new rule is enacted that 'would impair rights a party possessed when he acted . . . or impose new duties with respect to transactions already completed,' there is a general presumption the rule should not be applied retroactively." *Kindred Hosps. Ltd. P'ship v. Lutrell*, 190 S.W.3d 916, 922 (Ky. 2006), *as corrected* (June 12, 2006) (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 678, 124 S.Ct. 2240, 2241, 159 L.Ed.2d 1 (2004)).

The taxes in this case were collected in good faith by the library districts, in reliance on the advice of the Executive Branch. As the Opinion states:

> The record in this case reflects that eighty library districts across Kentucky, created by petition under KRS Chapter 173, who have followed the tax provisions of KRS 132.023, would be adversely affected if the decisions of the Campbell and Kenton Circuit Courts were to stand. For over thirty years, without protest or challenge, the library districts created by petition have acted in good faith and conducted their affairs in accordance with the directions of the Executive Branch, which was charged by law to implement the applicable statutes in question. While our opinion today stands on the harmonization of these statutes, based on our interpretation of legislative intent, we believe the ultimate recourse for statutory change lies in the General Assembly, not the courts.

Campbell Cty. Library Bd., 475 S.W.3d at 48.

In light of these unique facts, this case presents one of the rare occasions when a court is justified in exercising its discretion "to make application of a holding prospective only[.]" *Branham v. Stewart*, 307 S.W.3d at 102.

III. Whether prospective-only application of KRS 173.790 violates the separation of powers doctrine

Section 27 of the Kentucky Constitution mandates separation among the three branches of government and Section 28 specifically prohibits incursion of one branch of government into the powers and functions of the others. *Legislative Research Comm'n By & Through Prather v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984). "The essential purpose of separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches." *Appalachian Racing, LLC. v. Commonwealth*, 504 S.W.3d 1, 4-5 (Ky. 2016). The taxpayers argue that a prospective-only application of the holding of the Opinion violates the doctrine of separation of powers by nullifying the effect of KRS 173.790 for the period preceding the Opinion, thereby encroaching on the province of the legislature.

We are unable to find any legal authority in Kentucky to support this theory. Justice Scalia's concurring opinions in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 548-49, 115 L.Ed.2d 481, 497,

111 S.Ct. 2439 (1991) and *Harper*, *supra*, adopted this approach but, according to Jill E. Fisch in *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1055, 1077 (1997), "a majority of the [United States Supreme] Court has never expressly recognized any constitutional limitation on adjudicative nonretroactivity." We similarly choose not to recognize such a limitation on the discretionary powers of Kentucky courts.

IV. Whether the circuit court misapplied the *Chevron Oil* factors, thereby working a manifest injustice on the taxpayers

Finally, the taxpayers argue in the alternative that, even if the *Chevron Oil* analysis is applicable, the facts of this case do not support the circuit court's decision. *Chevron Oil* provides three factors for the court to use in determining whether a decision is to be applied retroactively: first, it "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; second, the court "must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."; and third, the court must weigh "the inequity imposed by retroactive application, for '(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the

'injustice or hardship' by a holding of nonretroactivity.'" *Chevron*, 404 U.S. at 106-07, 92 S.Ct. at 355 (internal citations omitted). Under *Yount v. Calvert*, 826 S.W.2d 833, 837 (Ky. App. 1991), we review the application of the *Chevron* factors for an abuse of discretion. "An abuse of discretion occurs when a trial court enters a decision that is arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Harris*, 320 S.W.3d 138, 141 (Ky. App. 2010) (citations omitted).

As to the first *Chevron* factor, the circuit court found that there was no clear, past precedent regarding the proper statute to use in calculating the tax rate, and that the Board was given conflicting guidance by the Office of the Attorney General and the Kentucky Department for Library and Archives (KDLA). The taxpayers argue that the Board did not in fact rely on this guidance and actually disregarded the recommendation of the KDLA contained in the Kentucky Public Library Trustee Manual, which advised that tax districts could increase their tax rate significantly by the same method by which they were established; hence, those districts established by petition under KRS 173.720 could only increase their rate by petition. The taxpayers also argue that informal guidance from the KDLA and opinions of the Attorney General do not constitute "legal precedent," and that the plain language of KRS 173.790 was the sole, clear past "legal precedent" expressly applicable to library districts organized by petition.

The fact that a panel of this Court wrote a twenty-two-page Opinion reversing two well-reasoned circuit

court opinions and expressly stated that the library districts acted in good faith in accordance with the directions of the Executive Branch for over thirty years supports the circuit court's finding that there was no clear past precedent on this issue and that this was also an issue of first impression whose resolution was not clearly foreshadowed. Thus, the Opinion meets the first *Chevron* factor in that it established a new principle of law meriting prospective application only.

In respect to the second factor, the circuit court found that the Opinion's harmonization of the two statutes was intended to avoid adversely affecting the libraries which had used KRS 132.023 in setting their ad valorem tax rates, and that consequently retroactive application of the new rule would not further its operation. The taxpayers argue that this approach confuses the purpose of the Opinion with the purpose of the harmonized rule itself. They contend that the common purpose and effect of both the harmonized statutes is to protect taxpayers, not library districts, and that a prospective application frustrates the purpose of the new rule by legitimizing and perpetuating tax increases made in 2000, 2003 and 2004 without a voters' petition.

But the Opinion construes KRS 173.790 "as a method available to a library taxing district seeking to increase the revenue from ad valorem taxes over 4 percent of the revenue generated from the compensating tax rate as permitted by KRS 132.023." *Campbell Cty. Library Bd.*, 475 S.W.3d at 47. Thus, the legislature provided library taxing districts with a special means

to increase their revenue apart from KRS 132.023, which suggests a strong interest in ensuring that the public libraries were always adequately funded.

Thirdly and finally, the circuit court determined that retroactive application of the decision would cause "substantial inequitable results" because it might require the refund of taxes that would severely deplete the resources of numerous public libraries. This conclusion was founded on the Opinion, which expressed serious concerns about the adverse consequences on eighty library districts, in existence for over thirty years, if the original decision of the Campbell Circuit Court holding that KRS 173.790 was the controlling statute was allowed to stand. The appellants characterize the circuit court's conclusion as ill-founded because there is nothing in the record to show that any library district other than the Campbell Board has ever sought to increase its tax rate by more than four percent without a petition of the voters. According to the taxpayers, their research shows only the Campbell Board has ever violated KRS 173.790 as harmonized by the Opinion. They emphasize that prospective-only application will allow the Board not only to retain excessive tax revenues improperly but to maintain those inflated rates by means of a petition of voters. Even if we accept the taxpayers' claim that retroactive application of the Opinion will impact solely the Campbell County Library Board and no other, the Board maintains that that retroactive application would require the refund of millions of dollars already spent on facilities, books, staff and other library operations. Under

the circumstances, the circuit court did not abuse its discretion in weighing the evidence and deciding that retroactivity would lead to substantial inequitable results.

Conclusion

For the foregoing reasons, the order of the Campbell Circuit Court granting summary judgment and the order denying the motion to amend, alter or vacate are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Timothy J. Eifler
Stephen A. Sherman
Louisville, Kentucky

Erica L. Horn
Madonna E. Schueler
Lexington, Kentucky

Brandon N. Voelker
Fort Mitchell, Kentucky

BRIEF FOR APPELLEE:

Jeffrey C. Mando
Louis D. Kelly
Covington, Kentucky

COMMONWEALTH OF KENTUCKY
CAMPBELL CIRCUIT COURT
DIVISION NO. ONE
CASE NO. 12-CI-0089

Charlie Coleman, *et al.* **Plaintiffs,**

-vs-

Campbell County Library Board of Trustees **Defendant.**

ORDER

(Entered Oct. 21, 2016)

Defendant, Campbell County Library Board of Trustees (hereinafter "Defendant"), filed a Motion for Summary Judgment on February 8, 2016. Plaintiffs, Charlie Coleman, John P. Roth Jr., and Erik Hermes (hereinafter "Plaintiffs"), filed a Combined Response and Cross-Motion for Summary Judgment on March 21, 2016. On April 20, 2016, Defendant filed a Response to Plaintiffs' Cross-Motion for Summary Judgment. A Reply was filed by Plaintiffs on May 27, 2016, and Defendant filed its Reply on June 10, 2016. Oral arguments were held on August 8, 2016, and this Court issued an Order granting Defendant's Motion for Summary Judgment on September 16, 2016. Plaintiffs filed a Motion to Amend, Alter, or Vacate the order on September 26, 2016, and Defendant responded on October 6, 2016. On October 10, 2016, Plaintiffs filed a Reply.

Plaintiffs filed a Class Action Complaint on January 19, 2012, challenging the ad valorem tax rates imposed by Defendant starting in 1994 and seeking a refund on behalf of all property owners in Campbell County. Specifically, Plaintiffs alleged that Defendant had set its ad valorem tax rate in excess of that allowed by KRS 173.790. Defendant had been utilizing KRS 132.023 to calculate its ad valorem tax rates. On April 1, 2013, this Court granted summary judgment in favor of Plaintiffs on their Declaratory Judgment claim. Defendant appealed. On March 20, 2015, the Court of Appeals reversed, finding that Defendant was able to set its ad valorem tax rates based on KRS 132.023 as long as it did not increase revenue above 4 percent above the compensating tax rate. The Court of Appeals harmonized the statutes by determining that if Defendant wishes to increase the ad valorem tax rate above the 4 percent increase it must utilize the procedure spelled out in KRS 173.790, which only allows an increase by a petition of the voters. The case was reversed and remanded for proceedings consistent with the Court of Appeals opinion. On April 20, 2015, Plaintiffs sought discretionary review with the Kentucky Supreme Court; however, that review was denied on December 10, 2015.

In their current motion, Plaintiffs seek to have this Court amend, alter, or vacate its order granting summary judgment to Defendant under CR 59.05. The Kentucky Supreme Court has limited the grounds for relief under CR 59.05 to those laid out by the Federal Rule of Civil Procedure 59(e). Those are as follows:

> First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. . . . Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

Hall v. Rowe, 439 S.W.3d 183, 186 (Ky. Ct. App. 2014).

Plaintiffs point to *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco* to support their argument that federal and Kentucky law require meaningful backward looking relief when taxes are paid under an unlawful tax scheme. In *McKesson*, Florida's liquor excise tax scheme was found to be unconstitutional under the Commerce Clause. 496 U.S. 18, 25 (1990). The Supreme Court held that

> [w]hen a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first before obtaining review of the tax's validity, federal due process principles . . . require the State's postdeprivation procedure to provide a 'clear and certain remedy,' for the deprivation of tax moneys in an unconstitutional manner.

Id. at 51.

However, in the current case, the Kentucky Court of Appeals did not find KRS 173.790 or KRS 132.023 unconstitutional, rather it harmonized the two statutes.

Further, it did not state that Defendant erred when it used only KRS 132.023 to assess the ad valorem tax rates, but instead noted that "the library districts created by petition have acted in good faith. . . ." *Campbell County Library Board of Trustees v. Coleman*, 475 S.W.3d 40, 48 (Ky. Ct. App. 2015). Therefore, since *McKesson* requires meaningful backward looking relief when taxes are paid under an unconstitutional tax scheme and the tax scheme at issue here was not found to be unconstitutional, this Court does not believe *McKesson* is applicable. Thus, this Court does not believe that any of the grounds that would warrant 59.05 relief are present in the current case.

Wherefore, Plaintiffs' Motion to Amend, Alter, or Vacate is DENIED.

DATE: 10-20-16

/s/ J Ward
JULIE REINHARDT WARD,
Judge

CC: Counsel of Record

COMMONWEALTH OF KENTUCKY
CAMPBELL CIRCUIT COURT
DIVISION NO. ONE
CASE NO. 12-CI-89

Charlie Coleman, *et al.* **Plaintiffs,**

v.

Campbell County Library Board of Trustees **Defendant.**

ORDER

(Entered Sep. 16, 2016)

Defendant, Campbell County Library Board of Trustees, filed a Motion for Summary Judgment on February 8, 2016. Plaintiffs, Charlie Coleman, John P. Roth Jr., and Erik Hermes, filed a Combined Response and a Cross-Motion for Summary Judgment on March 21, 2016. On April 20, 2016, Defendant filed a Response to Plaintiffs' Cross-Motion for Summary Judgment. A Reply was filed by Plaintiffs' on May 27, 2016, and Defendant filed its Reply on June 10, 2016.

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1, 2013, this Court granted summary judgment in favor of Plaintiffs on their Declaratory Judgment claim. Defendant appealed. On March 20, 2015, the Court of Appeals reversed, finding that Defendant was able to set its ad valorem tax rates based on KRS 132.023 as long as it did not increase revenue above 4 percent above the compensating tax rate. The Court of Appeals harmonized the statutes by determining that if Defendant wishes to increase the ad valorem tax rate above the 4 percent increase it must utilize the procedure spelled out in KRS 173.790, which only allows an increase by a petition of the voters. The case was reversed and remanded for proceedings consistent with the Court of Appeals opinion. On April 20, 2015, Plaintiffs sought discretionary review with the Kentucky Supreme Court; however, that review was denied on December 10, 2015.

In its current motion, Defendant asserts that it is entitled to summary judgment on all Plaintiffs' claims in light of the Court of Appeals' decision. In turn, Plaintiffs argue that they are entitled refunds for each of the 2006 through 2015 tax years based on the fact that Defendant calculated the ad valorem tax rate to be above the 4 percent increase without the authorizing petition of the voters as required by the Court of Appeals' decision. This Court requested that each party focus its Responses on the issue of whether the Court of Appeals' opinion applies retroactively or prospectively.

Kentucky courts are permitted to grant summary judgment "if the pleadings . . . show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." CR 56.03. The Supreme Court of Kentucky has repeatedly advised that courts should cautiously grant summary judgment. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). As such, this Court will view the record in this case "in a light most favorable to the party opposing the motion for summary judgment and [resolve] all doubts . . . in [its] favor." *Id.* Summary judgment will only be used by this Court "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Id.* at 483 (*quoting Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (1985)).

In *Chevron Oil Company v. Huson*, the United States Supreme Court laid out a three-pronged test for determining whether a decision is to be applied retroactively. 404 U.S. 97, 106 (1971). The test has been utilized by Kentucky courts in determining whether a decision should be applied retroactively or prospectively.[1] The test is as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on

[1] *See Frisby v. Bd. of Educ. of Boyle Cnty*, 707 S.W.2d 359, 362 (Ky. Ct. App. 1986); *Yount v. Calvert*, 826 S.W.2d 833, 836 (Ky. Ct. App. 1991); *Revenue Cabinet, Commonwealth of Kentucky v. CSC Oil Co., Inc.*, 851 S.W.2d 497, 499 (Ky. Ct. App. 1993); *Founder v. Cabinet for Human Resources, Dept. for Employment Services, Div. of Unemployment Ins.*, 23 S.W.3d 221, 224 (Ky. Ct. App. 1999).

> which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' . . . Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'

Yount v. Calvert, 826 S.W.2d 833, 836 (Ky. Ct. App. 1991) (*quoting Chevron Oil*, 404 U.S. at 106-07). The first prong requires a court to determine whether the decision in issue establishes a new principle of law by either overruling clear, past precedent or by deciding an issue of first impression whose resolution was not foreshadowed. This Court does not believe that there was clear, past precedent regarding the proper statute to use; however, there had been some conflicting guidance give [sic] to Defendant by the Executive Branch. For example, the Office of the Attorney General issued three opinions indicating that the appropriate statute to use was KRS 173.790.[2] The Court of Appeals noted that all Kentucky library districts had been using KRS 132.023 to calculate their ad valorem taxes at the direction of the Executive Branch. *Campbell County*

[2] *See* OAG 80-570, OAG 81-257, and OAG 84-141.

Library Board of Trustees v. Coleman, 475 S.W.3d 40, 45 (Ky. Ct. App. 2015). Additionally, it stated that the "Kentucky Department for Library and Archives has been instructing public library districts to set the ad valorem tax rates in accordance with the compensating tax rate and KRS 132.023 for over thirty years . . . " *Id.* Thus, while there may not have been clear, past precedent, the Court of Appeals' decision to harmonize the two statutes overrode the guidance from the Kentucky Department for Library and Archives that Defendant had been relying on in setting its ad valorem tax rates.

The next determination is whether the Court of Appeals' opinion decided an issue of first impression whose resolution was not clearly foreshadowed. Here, the Court of Appeals harmonized the two statutes by making KRS 132.023 applicable to libraries up to a certain point before the procedure in KRS 173.790 is triggered. The Court believes that the resolution of this issue through the harmonization of the statutes was not clearly foreshadowed since there was no previous guidance that it was proper to use the statutes in unison when setting library ad valorem tax rates. As such, the first prong of the *Chevron Oil* analysis is satisfied.

The second prong of *Chevron Oil* requires an examination of "the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation." *Yount*, 826 S.W.2d at 836. The General Assembly intended for KRS 173.790 to be utilized for increasing the ad

valorem tax rate for library districts formed by petitions. The legislative purpose behind KRS Chapter 132, which capped the ad valorem tax rate that taxing districts could impose at the compensating tax rate, was to counter the dramatic increase in ad valorem taxes expected to occur as a result of *Russman v. Luckett.*[3] In this case, the rule announced by the Court of the [sic] Appeals gives effect to both statutes while harmonizing them. This Court believes the harmonization was done in an attempt to not adversely affect the libraries which had utilized KRS 132.023 in setting their ad valorem tax rates. Consequently, this Court does not believe that retroactive application will further the operation of the new rule. Thus, the second prong of the *Chevron Oil* analysis is satisfied.

Finally, this Court must consider whether the retroactive application of the decision would cause "substantial inequitable results." *Yount*, 826 S.W.2d at 836. In this case, retroactive application of the Court of Appeals' decision would require Defendant to refund Plaintiffs for the excess they paid in ad valorem taxes prior to the rendering of the decision.[4] This would require Defendant to potentially repay millions of dollars collected in ad valorem taxes which have been utilized for library programs and services. The Court of

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[3] *Russman v. Luckett* was issued in 1965 and changed the valuation of property to be 100 percent of its fair cash value, which would have drastically increased the ad valorem tax rate. 391 S.W.2d 694 (Ky. Ct. App. 1965).

[4] The amount would depend upon the applicability of common law and statutory remedies to the case.

Appeals noted that "eighty library districts across Kentucky, created by petition under KRS Chapter 173, who have followed the tax provisions of KRS 132.023, would be adversely affected . . . " *Coleman*, 475 S.W.3d at 48. This Court believes that this is the kind of substantial inequitable results the *Chevron Oil* analysis is meant to avoid. Accordingly, the third prong of the *Chevron Oil* analysis is satisfied.

In conclusion, this Court believes that the Court of Appeals' decision harmonizing KRS 173.790 and KRS 132.023 was meant to be applied prospectively. Wherefore, Defendant's Motion for Summary Judgment is GRANTED and Plaintiffs' Cross-Motion for Summary Judgment is DENIED.

THIS IS A FINAL AND APPEALABLE ORDER AND THERE IS NO JUST CAUSE FOR DELAY.

DATE: 9-16-16

/s/ J Ward
JULIE REINHARDT WARD,
Judge

CC: Counsel of Record

Supreme Court of Kentucky
2015-SC-000188-D
(2013-CA-000883)

CHARLIE COLEMAN, ET AL. MOVANTS

CAMPBELL CIRCUIT COURT
V. 2012-CI-00089

CAMPBELL COUNTY PUBLIC
LIBRARY BOARD OF TRUSTEES RESPONDENT

AND

2015-SC-000189-D
(2013-CA-000874 & 2013-CA-001010)

GARTH KUHNHEIN, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED MOVANTS

KENTON CIRCUIT COURT
V. 2012-CI-00178

KENTON COUNTY PUBLIC
LIBRARY BOARD OF TRUSTEES RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motions for review of the decision of the Court of Appeals are denied.

Venters, J., would grant discretionary review.

Wright, J., not sitting.

ENTERED: December 10, 2015.

/s/ John D. Minton, Jr.
CHIEF JUSTICE

RENDERED: March 20, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000883-MR

CAMPBELL COUNTY
LIBRARY BOARD
OF TRUSTEES — APPELLANT

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE
v. JULIE REINHARDT WARD, JUDGE
ACTION NO. 12-CI-00089

CHARLIE COLEMAN;
JOHN P. ROTH; AND
ERIK HERMES — APPELLEES

NO. 2013-CA-000874-MR
AND AND
NO. 2013-CA-001010-MR

KENTON COUNTY
LIBRARY BOARD
OF TRUSTEES — APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL
FROM KENTON CIRCUIT COURT
v. HONORABLE
PATRICIA M. SUMME, JUDGE
ACTION NO. 12-CI-00178

GARTH KUHNHEIN — APPELLEE/CROSS-APPELLANT

OPINION
REVERSING AND REMANDING
APPEAL NOS. 2013-CA-000883-MR AND
2013-CA-000874-MR AND AFFIRMING
CROSS-APPEAL NO. 2013-CA-001010-MR

** ** ** ** **

BEFORE: NICKELL, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: At issue in this consolidated appeal from the Campbell and Kenton Circuit Courts is whether public libraries in Kentucky, created by petition pursuant to Kentucky Revised Statutes (KRS) 173.710 *et seq.*, may assess the library's ad valorem tax rate in accordance with KRS 132.023 (commonly referred to as House Bill 44) or pursuant to the provisions of KRS 173.790.

The Campbell County Library Board of Trustees (Campbell Board) brings Appeal No. 2013-CA-000883-MR from a May 13, 2013, Order of the Campbell Circuit Court holding that KRS 173.790 controlled any increase in the ad valorem tax rate imposed by the Campbell Board. The Kenton County Library Board of Trustees (Kenton Board) brings Appeal No. 2013-CA-000874-MR and Garth Kuhnhein brings Cross-Appeal No. 2013-CA-001010-MR from an April 11, 2013, Summary Judgment of the Kenton Circuit Court also concluding that KRS 173.790 controlled any increase in the ad valorem tax rate imposed by the Kenton Board. For the reasons stated, we reverse and remand Appeal

Nos. 2013-CA-000883-MR and 2013-CA-000874-MR and affirm Cross-Appeal No. 2013-CA-001010-MR.

BACKGROUND – CAMPBELL COUNTY

In 1978, the Campbell County Library was created by petition of the voters as a public library district pursuant to KRS 173.710-173.800. In accordance with KRS 173.720, the petition was signed by more than 51 percent of Campbell County voters who voted in the last general election, and the petition was filed with the Campbell County Fiscal Court. The petition set forth an ad valorem tax rate of $0.30 per thousand dollars of assessed property value as funding for the Campbell County Library District. Since that time, the Campbell County Library District's ad valorem tax rate has been calculated pursuant to the provisions of KRS 132.023, and in 2011 the tax rate was $0.457 per thousand dollars of value.

On January 19, 2012, Charlie Coleman, John P. Roth, and Erik Hermes (collectively referred to as appellees/taxpayers), as landowners in Campbell County, filed a declaratory judgment action against the Campbell Board seeking class action certification in the Campbell Circuit Court. Appellees/taxpayers claimed, *inter alia*, that the Campbell Board improperly increased the ad valorem tax rate in violation of KRS 173.790 and sought a refund of overpaid taxes. Appellees/taxpayers argued that the Campbell Board erroneously utilized KRS 132.023 to authorize the increase in the ad valorem tax rate. Appellees/taxpayers maintained

that the Campbell Board should have utilized KRS 173.790 to impose an increase in the ad valorem tax rate and that such increase could only be obtained by petition of the voters. As the Campbell Board increased the ad valorem tax rate without complying with KRS 173.790, appellees/taxpayers sought a refund of "overpaid" ad valorem taxes collected by the Campbell Board. Conversely, the Campbell Board maintained that the ad valorem tax rate was correctly assessed pursuant to KRS 132.023 and that appellees/taxpayers are not entitled to relief.

Both parties filed motions for summary judgment upon the legal issue of whether KRS 132.023 or KRS 173.790 controlled the ad valorem tax rate. By order granting summary judgment entered April 1, 2013, the circuit court held that KRS 173.790 controlled as the more specific statute. The court stated:

> Where two statutes are in apparent conflict, and their inconsistencies cannot be reconciled, "the one containing express and positive language relating to the particular subject should take precedence over a provision dealing with a matter in general terms." *Commonwealth v. Martin*, 777 S.W.2d 236 (Ky. App. 1989). Moreover, it is the Court's duty to harmonize the law so as to give effect to both statutes. *Allen v. McClendon*, 967 S.W.2d 1 (Ky. 1998). KRS 173.790 specifically refers to the "special ad valorem tax rate for the maintenance and operation of a public library district." KRS 132.023 and KRS 132.010 refer generally to taxing districts. Since KRS

> 173.790 specifically addresses the procedure for increasing or decreasing the Library Tax Rate, it must control over the general provisions of KRS Chapter 132. This interpretation gives effect to both statutes and prevents KRS 173.790 from being meaningless.

Upon motion of the Campbell Board, the circuit court designated the April 1, 2013, summary judgment final and appealable per Kentucky Rules of Civil Procedure (CR) 54.02, by order entered May 13, 2013. The Campbell Circuit Court appeal followed.

BACKGROUND – KENTON COUNTY

In 1967, the Kenton County Public Library was created by petition of the voters as a public library district pursuant to KRS 173.710-173.800. In accordance with KRS 173.720, the petition was signed by more than 51 percent of Kenton County voters who voted in the last general election, and the petition was filed with the Kenton County Fiscal Court. The petition set forth an ad valorem tax rate of $0.60 per thousand dollars of assessed property value as funding for the Kenton County Library District. Since 1979, the Kenton County Library District's ad valorem tax rate has been calculated pursuant to KRS 132.023, and in 2011 the ad valorem tax rate had increased to approximately $1.13 per thousand dollars of assessed real property value.

On January 20, 2012, Garth Kuhnhein and "others similarly situated," (collectively referred to as appellees/

taxpayers) as property owners in Kenton County, filed a declaratory judgment action against the Kenton Board seeking class action certification in the Kenton Circuit Court. Kuhnhein claimed, *inter alia*, that the Kenton Board improperly increased the ad valorem tax rate in violation of KRS 173.790 and sought a refund of overpaid taxes. Kuhnhein maintained that the Kenton Board erroneously utilized KRS 132.023 to increase the ad valorem tax rate. Kuhnhein argued that the Kenton Board should have utilized KRS 173.790 to impose an increase in the ad valorem tax rate and that such increase could only be obtained by petition of the voters. As the Kenton Board increased the ad valorem tax rate without complying with KRS 173.790, Kuhnhein sought a refund of "overpaid" ad valorem taxes collected by the Kenton County Library District. Conversely, the Kenton Board maintained that the ad valorem tax rate was correctly assessed pursuant to KRS 132.023 and that Kuhnhein was not entitled to relief.

Both parties filed motions for summary judgment. In its summary judgment, the circuit court concluded that KRS 173.790 controlled as the more specific statute concerning imposition of an ad valorem tax rate and that the Kenton Board improperly relied upon KRS 132.023 to increase the ad valorem tax rate. However, the circuit court denied Kuhnhein a refund for "overpaid" ad valorem taxes from the Kenton County Library District. The court designated the summary judgment as final and appealable per CR 54.02. The

Kenton Circuit Court appeal and cross-appeal followed.

STANDARD OF REVIEW

Summary judgment is appropriate where there exists no material issue of fact and movant is entitled to judgment as a matter of law. CR 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). However, the facts in these cases are not in dispute. Accordingly, resolution of these appeals looks to the interpretation, construction, and application of KRS 132.023, KRS 173.790, and KRS 65.190, which is a question of law. *See City of Worthington Hills v. Worthington Fire Prot. Dist.*, 140 S.W.3d 584 (Ky. App. 2004). We thus review the rulings below *de novo. See 3D Enterprises Contracting Corp. v. Louisville and Jefferson County*, 174 S.W.3d 440 (Ky. 2005).

ANALYSIS

We begin our analysis by reviewing the relevant legislative history as concerns the creation and funding of library taxing districts formed by petition in Kentucky, and subsequent legislation related thereto.

In 1964, the General Assembly enacted KRS 173.710-173.800 entitled "Library Districts Formed by Petition." Pursuant to KRS 173.720, a library district could be formed by a petition setting forth the ad valorem rate and signed by 51 percent of the voters in a county who voted in the last general election. The ad

valorem tax rate is required to be set forth in the petition. KRS 173.790 provided that the ad valorem tax rate could be only increased or decreased by a petition signed by 51 percent of the voters.

In 1965, the Supreme Court rendered *Russman v. Luckett*, 391 S.W.2d 694 (Ky. 1965). In *Russman*, 391 S.W.2d 694, the Supreme Court held that real property and personal property must be assessed at 100 percent of fair cash value for tax purposes. The Court observed that real property and personal property had been previously assessed at only 12½ to 33 percent of fair cash value. The Supreme Court recognized that "immediate compliance" with its decision was impossible but mandated that all property be assessed at 100 percent of fair market value beginning January 1, 1966. *Id.* at 699.

Because of the *Russman* decision, property owners in Kentucky were facing the prospect of dramatically increased ad valorem taxes. *See id.* To prevent the imposition of such increased property taxes, the General Assembly passed KRS Chapter 132 (commonly referred to as the "rollback law") in special session, and its provisions became effective December 16, 1965. The "rollback law" is discussed in detail in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 195 (Ky. 1989).

Under KRS 132.023,[1] a taxing district could not impose ad valorem taxes in excess of the "compensating tax rate":

> (1) Notwithstanding any statutory provisions to the contrary, for 1966 and for all subsequent years, no taxing district, other than the state, counties, school districts, and cities, shall levy a tax rate which exceeds the compensating tax rate defined in KRS 132.010.

And, the compensating tax rate was defined as:

> (6) "Compensating tax rate" means the rate which, rounded to the next higher one-tenth of one cent per one hundred dollars of assessed value and applied to the 1966 assessment of the property subject to taxation by a taxing district for the 1965 tax year, produces an amount of revenue approximately equal to that produced in 1965.

KRS 132.010(6).[2]

Thereafter, in 1972, KRS 132.010(6) and KRS 132.425 were amended to permit increases in revenue based upon inflation of assessed property values or net assessment growth. KRS 132.010(6). *See Rose*, 790 S.W.2d 186. By this amendment, revenues from ad

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[1] We quote the version of Kentucky Revised Statutes (KRS) 132.023 effective December 16, 1965.

[2] We quote the version of KRS 132.010 effective December 16, 1965.

valorem taxes increased correspondingly to increases in property value assessments.

The 1972 amendments led to dramatic and unexpected increases in ad valorem taxes, so the General Assembly again amended KRS Chapter 132 by special session in 1979. In the special session, the General Assembly removed inflationary property value increases from the calculation of the compensating tax rate. Under the 1979 amendment, commonly referred to as House Bill 44, a taxing district could increase revenue from taxes by 4 percent or less per year over the compensating tax rate without triggering a possible voter recall referendum. The applicable provision of KRS 132.023[3] read:

> (4)(a) That portion of a tax rate levied by an action of a tax district, other than the state, counties, school districts, cities and urban-county governments which will produce revenue from real property, exclusive of revenue from new property, more than four percent (4%) over the amount of revenue produced by the compensating tax rate defined in KRS 132.010 from real property shall be subject to a recall vote or reconsideration by the taxing district, such as the case may be, as provided for in Section 8 of this Act, and shall be advertised as provided for in paragraph (b) of this subsection.

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[3] We quote the version of KRS 132.023(4)(a) effective on February 13, 1979; presently, this subsection is codified at KRS 132.023(3)(a).

Under KRS 132.023(4)(a), a taxing district could increase revenue from ad valorem taxes up to 4 percent without triggering a reconsideration by the taxing district or voter recall.

In 1984, the General Assembly enacted KRS 65.180-65.190 entitled "Taxing Districts." Under the statutory provisions, the Legislature set forth uniform procedures for the creation of taxing districts. Specifically, KRS 65.182 states "[e]xcept as otherwise provided by state law, the sole methods of creating a taxing district shall be in accordance" with the provisions of KRS 65.180-65.190. Simultaneously, the statutory provisions relating to formation of library districts by petition were also amended.[4] In particular, the procedures for creating a library district by petition were deleted from KRS 173.720. And, KRS 173.720 was amended to provide that library "[d]istricts organized pursuant to the provisions of this section prior to July 13, 1984[,] shall be governed by the provisions of KRS 173.710 to 173.800."[5] However, § 6 of House Bill 36, codified at KRS 65.190, provided that the provisions of House Bill 36 "shall not be construed as limiting or changing the power or organization of taxing districts created prior to July 13, 1984." As a result of these

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[4] The creation of KRS Chapter 65 and amendments to KRS Chapter 173 were included in House Bill 36 (1984 Ky. Acts Ch. 100) in the 1984 legislation.

[5] The Kenton County Library District was formed by petition in 1967, and the Campbell County Library District was formed by petition in 1978; thus, both come within the ambit of KRS 173.710-173.800.

1984 amendments, library districts are no longer formed by petition under KRS 173.720.

We pause at this stage of our analysis to note that the parties in both cases have done a most thorough and outstanding analysis in the presentation of their respective positions and are to be so commended. This Court is presented with a legislative quandary for which there exists persuasive authority on both sides of the issue to support the parties' respective positions.

For example, the Kenton and Campbell Boards aptly note that since the passage of House Bill 44 in 1979, all library districts in Kentucky, whether formed by petition or ballot, have been assessing their ad valorem tax rates in accordance with KRS 132.023, and at the direction of the Executive Branch of state government. The Kentucky Department for Library and Archives has been instructing public library districts to set the ad valorem tax rates in accordance with the compensating tax rate and KRS 132.023 for over thirty years, with the Kentucky Department of Revenue computing and providing the library districts with the compensating tax rate annually.

And the respective appellee/taxpayers in both cases correctly point out that the Kentucky Attorney General has issued opinions on at least three or more occasions, including OAG 80-570, OAG 81-257 and OAG 84-141, after the passage of House Bill 44, that recognized or at least inferred that the tax rates for library districts created by petition are governed by KRS Chapter 173.790. Appellees/taxpayers further

emphasize that in the passage of House Bill 36 in 1984, the General Assembly intended for library districts created prior to July 13, 1984, to be exclusively subject to the tax provisions of KRS 173.790. The logic of their argument is persuasive, were it not for the existence of other statutes applicable to the issue in dispute.

As concerns the Attorney General opinions relied upon by appellees/taxpayers, these opinions are persuasive but certainly are not binding precedents on this Court. *York v. Commonwealth*, 815 S.W.2d 415 (Ky. App. 1991). Additionally, in regard to House Bill 36 and the 1984 Amendment to KRS Chapter 173, we are also mindful, as previously noted in this opinion, that in the same legislation, the General Assembly passed § 6 of House Bill 36, which is a conflicting statutory provision that clearly states that all taxing districts, which would include library districts, created prior to July 13, 1984, would not have their existing powers or organization affected by House Bill 36. *See* KRS 65.190.

There is no dispute in this case that KRS 132.023 and KRS 173.790, on their face, are in conflict. At the risk of being accused of judicial activism, this Court must now determine which statutory provision controls, or in the alternative, determine whether these statutes can be harmonized together and applied to the legal issues raised in these cases. The case simply boils down to one of statutory construction.

In construing statutes, the Kentucky Supreme Court has held that courts must give effect to the intent of the General Assembly. *Maynes v. Commonwealth*,

361 S.W.3d 922 (Ky. 2012). That intent is derived from the language of the statute as defined by the General Assembly or in the context of the subject matter at issue. *Shawnee Telecomm. Res., Inc. v. Brown*, 354 S.W.3d 542 (Ky. 2011). And, courts must presume that the General Assembly intended for a statute to be construed as a whole and to be harmonized with all related statutes. *Id.*

The harmonization of statutes looks to interpreting or construing seemingly inconsistent statutes like we are faced with in KRS 132.023 and KRS 173.790. Additionally, in harmonizing these statutes, we are cognizant of KRS 65.190. We are thus tasked with adopting an interpretation or construction that will give effect to all of the statutes at issue which also advances legislative intent. *See Combs v. Hubb Coal Corp.*, 934 S.W.2d 250 (Ky. 1996); *AK Steel Corp. v. Commonwealth,* 87 S.W.3d 15 (Ky. App. 2002). And, this Court must remain aware of the purposes for which the statutes were intended to accomplish. *City of Owensboro v. Noffsinger*, 280 S.W.2d 517 (Ky. 1955).

KRS 173.790 was initially passed in 1964 and was included in a statutory section entitled "Library Districts Formed by Petition." Upon its passage, there is little doubt that the General Assembly intended KRS 173.790 to be solely utilized to increase the ad valorem tax rate for a library district formed by petition. Soon thereafter in 1965, the Supreme Court rendered *Russman*, 391 S.W.2d 694. Because of *Russman*, 391 S.W.2d 694, all ad valorem tax rates would dramatically increase because property was to be valued at 100 percent of its

fair cash value. It is obvious that *Russman*, 391 S.W.2d 694, would have increased ad valorem library taxes as well. In order to prevent such increase in ad valorem taxes, the General Assembly, via an extraordinary session, passed KRS Chapter 132 in 1965. And, KRS 132.023 specifically capped the ad valorem tax rate imposed by taxing districts at the compensating tax rate. At that time, it was the legislative purpose of KRS Chapter 132 to counter the dramatic increase in ad valorem taxes precipitated by *Russman*, 391 S.W.2d 694. Shortly thereafter in 1966, Kentucky's highest court recognized that library districts created under KRS Chapter 173 were indeed taxing districts created by statutory authority. *Boggs v. Reep*, 404 S.W.2d 24 (Ky. 1966).

Considering the purpose of KRS Chapter 132, and its direct focus on taxing districts, other than governmental bodies and school districts, we believe it was the legislative intent that KRS 132.023 apply to library taxing districts formed by petition under KRS 173.720. While appellees/taxpayers argue that these provisions should only apply to library districts created by ballot and not petition, that interpretation defies logic and common sense given the circumstances that existed when the statute was originally passed in 1965. KRS Chapter 132 was passed to offset the dramatic increase in ad valorem taxes that were likely to occur after *Russman*, 391 S.W.2d 694, including increases in ad valorem taxes for a library district formed by petition. Thus, we construe KRS 132.023 as applicable to a library taxing district formed by

petition, as there has been no subsequent legislative action to the contrary.

When KRS 132.023(1) was amended in 1979 by House Bill 44, the General Assembly clearly intended that its provisions would apply to all existing taxing districts other than governmental entities and school districts. And, the Executive Branch of government, charged with carrying out the laws passed by the General Assembly, also understood that all library districts were affected by the provisions of House Bill 44 and has proceeded accordingly thereon since 1979.

Thus, as to a library district formed by petition, we interpret KRS 132.023(1) as generally operating to cap the ad valorem tax rate of said library district at the compensating tax rate. And, KRS 132.023(3)(a), formerly KRS 132.023(4)(a), permits an increase of up to 4 percent above the revenue produced by the compensating tax rate. A library taxing district formed by petition may set the ad valorem tax rate each year at the compensating tax rate or at a rate that would allow up to 4 percent increase in revenue above the compensating tax rate as permitted under KRS 132.023.

However, our reconciliation of these statutes does not end here. We also construe KRS 173.790 to be concomitantly applicable as a method available to a library taxing district seeking to increase the revenue from ad valorem taxes over 4 percent of the revenue generated from the compensating tax rate as permitted by KRS 132.023. If a library taxing district formed by petition seeks to increase revenue from ad valorem

taxes above 4 percent of the revenue generated from the compensating tax rate, the specific procedure outlined in KRS 173.790 is then triggered and the tax rate or revenue from ad valorem taxes may only be increased by petition of the voters.[6]

In sum, we hold that KRS 132.023 and KRS 173.790 are both applicable to ad valorem taxing rates of a library taxing district formed by petition under KRS 173.720 and can be harmoniously interpreted to complement each other. KRS 132.023 generally controls the ad valorem tax rate assessed by a library taxing district formed by petition; however, KRS 173.790 is triggered if the library seeks to increase revenue from ad valorem taxes above 4 percent of the revenue generated from the compensating tax rate as set forth in KRS 132.023(1) and (3). Our construction of KRS 132.023 and KRS 173.790 gives effect to both statutes and honors what we believe the General Assembly intended. The appellees/taxpayers argument, relied upon by the circuit courts below, that the 1984 amendment to KRS Chapter 173 reflects legislative intent to the contrary for library districts created by petition, is clearly refuted by KRS 65.190, also passed in 1984. To follow the literal interpretation of the 1984 legislation suggested by appellees/taxpayers would not be compatible with the object and purpose of the entire

[6] Thus, the provisions of KRS 132.023(3) concerning reconsideration by the taxing district or voter recall are inapplicable to library districts formed by petition. Rather, if revenue from ad valorem taxes is increased above 4 percent as set forth in KRS 132.023(3), the procedures of KRS 173.790 are triggered, and the increase must be approved by petition of the voters.

legislative scheme for taxing districts, especially as concerns library districts. And, the General Assembly's silence on this issue since 1984 buttresses our conclusions in the harmonization of these statutes. Since this Court has concluded that the statutes can be harmonized as stated, there is no necessity in addressing the parties' arguments regarding which is the more specific statute versus the more comprehensive statute.

Finally, in the absence of any legislative action over the past thirty-plus years that would alter our opinion today, we are reminded by former Chief Justice Palmore that "[w]hen all else is said and done, common sense must not be a stranger in the house of the law." *Cantrell v. Ky. Unemployment Ins. Comm'n*, 450 S.W.2d 235, 237 (Ky. 1970). Chief Justice Palmore was also a member of the Kentucky Supreme Court that rendered a unanimous opinion in 1978 in *Wayne Public Library Board of Trustees v. Wayne County Fiscal Court*, 572 S.W.2d 858 (Ky. 1978). In *Wayne*, the Supreme Court addressed a second attack on the constitutionality of the provisions of KRS Chapter 173 as pertains to the petition method of forming public library districts in Kentucky. As noted, that legislation was enacted in 1964. In upholding the statutes, the Supreme Court in *Wayne* noted that "[w]hen over two-thirds of the library districts in Kentucky are the children of these statutes, there can be no doubt that many important and valuable rights, obligations and services have vested." *Id.* at 859. That same logical common sense approach is also applicable to these cases now on appeal, notwithstanding that this Court has harmonized the statutes

at issue. The record in this case reflects that eighty library districts across Kentucky, created by petition under KRS Chapter 173, who have followed the tax provisions of KRS 132.023, would be adversely affected if the decisions of the Campbell and Kenton Circuit Courts were to stand. For over thirty years, without protest or challenge, the library districts created by petition have acted in good faith and conducted their affairs in accordance with the directions of the Executive Branch, which was charged by law to implement the applicable statutes in question. While our opinion today stands on the harmonization of these statutes, based on our interpretation of legislative intent, we believe the ultimate recourse for statutory change lies in the General Assembly, not the courts.

Accordingly, we hold that the Campbell and Kenton Circuit Courts erred as a matter of law by concluding that KRS 132.023 was inapplicable to library districts formed by petition and erred by rendering the respective summary judgments so concluding. We hold that KRS 132.023 and KRS 173.790 are both applicable to library districts formed by petition and can be harmonized in their application as set out in this Opinion.

For the foregoing reasons, Appeal Nos. 2013-CA-000883-MR and 2013-CA-000874-MR are reversed and remanded for proceedings consistent with this Opinion, and Cross-Appeal No. 2013-CA-001010-MR is affirmed as being moot.

ALL CONCUR.

BRIEFS FOR APPELLANT, CAMPBELL COUNTY LIBRARY BOARDS OF TRUSTEES:

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ORAL ARGUMENT FOR
KENTUCKY LIBRARY
ASSOCIATION;
KENTUCKY PUBLIC
LIBRARY ASSOCIATION;
FRIENDS OF KENTUCKY
PUBLIC LIBRARIES, INC.;
GENERAL FEDERATION
OF WOMEN'S CLUBS
KENTUCKY; AND
AMERICAN LIBRARY
ASSOCIATION:

Sheryl G. Snyder
Louisville, Kentucky

BRIEFS FOR APPELLANT/
CROSS-APPELLEE,
KENTON COUNTY
LIBRARY BOARD
OF TRUSTEES:

Michael W. Hawkins
Cincinnati, Ohio

Mary Ann Stewart
Covington, Kentucky

BRIEFS FOR APPELLEE/
CROSS-APPELLANT,
GARTH KUHNHEIN:

Timothy J. Eifler
Stephen A. Sherman
Louisville, Kentucky

Brandon N. Voelker
Cold Spring, Kentucky

Erica L. Horn
Sarah J. Bishop
Lexington, Kentucky

AMICI CURIAE BRIEF FOR KENTUCKY LIBRARY ASSOCIATION; KENTUCKY PUBLIC LIBRARY ASSOCIATION; FRIENDS OF KENTUCKY PUBLIC LIBRARIES, INC.; GENERAL FEDERATION OF WOMEN'S CLUBS KENTUCKY; AND AMERICAN LIBRARY ASSOCIATION:

Mark R. Overstreet
Frankfort, Kentucky

Sheryl G. Snyder
Chonghang Ge
Louisville, Kentucky

Virginia Hamilton Snell
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE, KENTON COUNTY LIBRARY BOARD OF TRUSTEES:

Michael W. Hawkins
Cincinnati, Ohio

ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT, GARTH KUHNHEIN:

Brandon N. Voelker
Cold Spring, Kentucky

ORAL ARGUMENT FOR
KENTUCKY LIBRARY
ASSOCIATION;
KENTUCKY PUBLIC
LIBRARY ASSOCIATION;
FRIENDS OF KENTUCKY
PUBLIC LIBRARIES, INC.;
GENERAL FEDERATION
OF WOMEN'S CLUBS
KENTUCKY; AND
AMERICAN LIBRARY
ASSOCIATION:

Sheryl G. Snyder
Louisville, Kentucky

COMMONWEALTH OF KENTUCKY
CAMPBELL CIRCUIT COURT
DIVISION 1
CASE NO. 12-CI-0089

CHARLIE COLEMAN,
et al. **PLAINTIFFS**

v.

CAMPBELL COUNTY
LIBRARY BOARD
OF TRUSTEES **DEFENDANT**

ORDER

This matter is before the Court on the Defendant's Motion for Summary Judgment on Count I of the Plaintiffs' Complaint which the Defendant, Campbell County Library Board of Trustees, filed on November 21, 2012. The Plaintiffs, Charlie Coleman, *et al.*, filed a Response and a Counter Motion for Summary Judgment as to the Declaratory Action (Count I) on December 7, 2012. The Defendant filed a Reply on December 26, 2012. On February 12, 2013, the Parties appeared before the Court for oral argument.

BACKGROUND

The Campbell County Library system is funded, in large part, through taxes collected from landowners in Campbell County. The amount a landowner owes towards the Library Tax is proportional to the assessed value of the landowner's property. A tax which is proportional to property value is known as an ad valorem

tax. This case involves a dispute between the Campbell Count Library Board of Trustees ("the Library") and a group of Campbell County landowners ("the Taxpayers") over increases in the Library's ad valorem tax rate ("the Library Tax Rate"). Specifically, the parties dispute which statute governs the procedure for increasing the Library Tax Rate. The Library argues that KRS Chapter 132 governs the Library Tax Rate. The Library further argues that the Library Tax Rate must be set according to the formula for a "Compensating tax rate" as defined in KRS 132.010(6). The Taxpayers argue that KRS 173.790 governs the Library Tax Rate. The Taxpayers further argue that the Library Tax rate cannot be increased unless the petition procedures of KRS 173.790 are followed. In their motions, the Parties have asked this Court for a declaratory judgment as to which statute governs the Library Tax Rate.

HISTORY

The Campbell County Library was created in 1978 via petition pursuant to KRS 173.710-.800. Included within those statutory provisions is KRS 173.790 which states, in part, that an ad valorem tax levied by a library organized by petition:

> . . . shall not be increased or decreased unless a duly certified petition requesting an increase or decrease in the tax rate of a specifically stated amount is signed by fifty-one percent (51%) of the number of duly qualified voters voting at the last general election . . .

In 1979, the Kentucky General Assembly enacted House Bill 44. As stated in the Preamble to the Act, House Bill 44 was enacted with the intent of reducing "the impact of inflation on property taxes, both state and local, without reducing necessary governmental services." After the adoption of House Bill 44, codified in KRS Chapter 132, the Library began levying its ad valorem tax rate based upon the formula for a "Compensating tax rate" as set forth in KRS 132.010. KRS 132.010 defines "Compensating tax rate", in part, as:

> . . . that rate which, rounded to the next higher one-tenth of one cent ($0.001) per one hundred dollars ($100) of assessed value and applied to the current year's assessment of the property subject to taxation by a taxing district, . . . produces an amount of revenue approximately equal to that produced in the preceding year from real property . . .

In other words, the "Compensating tax rate" adjusts based on property value fluctuations in order to provide consistent tax revenues from year to year. The Library argues that they set the Library Tax Rate according to the formula for "Compensating tax rate" because of KRS 132.023. KRS 132.023 states, in part:

> No taxing district . . . shall levy a tax rate which exceeds the "Compensating tax rate" defined in KRS 132.010, until the taxing district has complied with the provisions of subsection (2) of this section.

At the time of the Library's creation in 1978, the Library Tax Rate was set at $0.30 per thousand dollars

of assessed property valuation. The Library Tax Rate has continued to increase until 2010 when it reached a high of $0.72 per thousand dollars of value. As of 2011, the Library Tax Rate was set at $0.457 per thousand dollars of value.

ANALYSIS

Summary judgment is appropriate where the record shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56.03. The issue before the Court is purely a matter of statutory interpretation; statutory interpretation is a question of law and, therefore, summary judgment is appropriate. ***Neurodiagnostics, Inc. v. Kentucky Farm Bureau Mut. Ins. Co.***, 250 S.W.3d 321 (Ky. 2008).

The Library argues that administrative agencies in Kentucky interpret KRS Chapter 132 as governing a library's ad valorem tax rate and that this Court should give deference to those agency interpretations. As to questions of fact or the exercise of discretion by an administrative agency, judicial review is limited to whether the agency's decision was supported by substantial evidence or whether the decision was arbitrary or unreasonable. ***Canter v. Craig***, 574 S.W.2d 352 (Ky. App. 1978). However, statutory construction is a matter of law for the courts, and a reviewing court is not bound by an administrative body's interpretation of a statute. ***Delta Air Lines, Inc. v. Commonwealth Revenue Cabinet, Ky.***, 689 S.W.2d 14 (Ky. 1985).

Furthermore, an unambiguous statute is to be interpreted without resort to any outside aids. ***Gateway Construction Company v. Wallbaum***, 356 S.W.2d 247 (Ky. 1962). The issue in the present case is clearly one of law and the statutes involved are unambiguous. Therefore, this Court will interpret the statutes *de novo.*

Where two statutes are in apparent conflict, and their inconsistencies cannot be reconciled, "the one containing express and positive language relating to the particular subject should take precedence over a provision dealing with a matter in general terms." ***Commonwealth v. Martin***, 777 S.W.2d 236 (Ky. App. 1989). Moreover, it is the Court's duty to harmonize the law so as to give effect to both statutes. ***Allen v. McClendon***, 967 S.W.2d 1 (Ky. 1998). KRS 173.790 specifically refers to the "special ad valorem tax rate for the maintenance and operation of a public library district." KRS 132.023 and KRS 132.010 refer generally to taxing districts. Since KRS 173.790 specifically addresses the procedure for increasing or decreasing the Library Tax Rate, it must control over the general provisions of KRS Chapter 132. This interpretation gives effect to both statutes and prevents KRS 173.790 from being meaningless.

The Library argues that KRS 173.790 was repealed by implication when House Bill 44 was passed in 1979. This Court does not agree. A statute may be repealed by the express provision of a subsequent statute or by implication when the provisions of the earlier and later statutes are repugnant to each other and

irreconcilable or when the subsequent statute covers the whole subject-matter of the former and is manifestly intended as a substitute for it. ***Hallahan v. Sawyer***, 390 S.W.2d 664 (Ky. 1965). However, it is a well-settled rule of statutory construction that the repeal of an existing law by implication is not favored by the courts and a legislative enactment will not be interpreted as repealing by implication a prior statute unless the repugnancy is so clear as to admit no other reasonable construction. ***Tinton v. Brown***, 126 S.W.2d 1067 (Ky. 1939). Courts will presume that where the legislature intended a subsequent act to repeal a former one, it will so express itself so as to leave no doubt as to its purpose. ***Oldham County v. Arvin***, 64 S.W.2d 907 (Ky. 1933). As noted in ***Hardaway Management Co. v. Southerland, Ky.***, 977 S.W.2d 910 (Ky. 1998), it is a maxim of statutory construction that repeal by implication is not favored and will not be upheld unless such intention clearly appears or unless the repugnancy is so clear as to admit no other reasonable construction. *City of Eddyville v. City of Kuttawa*, 343 S.W.2d 404 (Ky. 1961).

This Court does not believe that KRS 173.790 and KRS Chapter 132 are repugnant and irreconcilable. The statutes can be reasonably construed in a manner that gives both statutes meaning and House Bill 44 contains no clear expression of intent to repeal KRS 173.790. Adopting the Library's view would render KRS 173.790 meaningless. Furthermore, this Court does not believe that KRS Chapter 132 covers the whole-subject matter of ad valorem tax rates to such

an extent that it is manifestly intended as a substitute for KRS 173.790. Pursuant to KRS 173.790, a library tax created by a petition of the people of a county can only be changed by a petition of the people of that county. There is a certain logic to this procedure and there is no manifest indication that the Kentucky State Legislature intended that House Bill 44 take this power away from the people. For these reasons, this Court does not believe that House Bill 44 repealed KRS 173.790 by implication.

As further evidence of statutory meaning and legislative intent this Court looks to House Bill 36 enacted in 1984. House Bill 36 amended two statutes relevant to this case. House Bill 36 amended KRS 173.720 to state, in part:

> Districts organized pursuant to the provisions of this section prior to July 13, 1984, shall be governed by the provisions of KRS 173.710 to 173.800.

Furthermore, House Bill 36 amended 173.790 to state, in part:

> The special ad valorem tax rate for the maintenance and operation of a public library district created pursuant to KRS 173.710 to 173.800 **before July 13, 1984**, shall not be increased or decreased unless a duly certified petition requesting an increase or decrease in the tax rate of a specifically stated amount is signed by fifty-one percent (51%) of the number of duly qualified voters voting at the last

> general election in each county in the district . . . (emphasis added).

The only amendment to KRS 173.790 was the addition of the phrase "before July 13, 1984." Surely the legislature would not have added language to a statute they already intended to have been repealed by implication and thereby rendered meaningless. Moreover, KRS 173.720 was amended to state in no uncertain terms that library districts organized pursuant to KRS 173.720 (such as the Campbell County Library District) **shall** be governed by the provisions by the provisions [sic] of KRS 173.710 to 173.800. (Emphasis added). In KRS 446.010(29), our legislature pronounced that in statutory construction, "shall" is a mandatory term. In addition, KRS 446.080(4) provides that words and phrases are to "be construed according to the common and approved usage of language" unless a word has a certain technical meaning. The statutory language of KRS 173.720 and 173.790 is clear and unambiguous. The Library Tax Rate shall be governed by KRS 173.790. Wherefore;

IT IS ORDERED that Defendant's Motion for Summary Judgment as to Count I is **Overruled** and the Plaintiffs' Motion for Summary Judgment as to Count I is **Sustained**. Furthermore, the parties are ordered to come before the Court on April 25, 2013 at 9:00 A.M. for a Status Conference.

DATED: 3-29-13

/s/ Julie Ward
JUDGE
JULIE REINHARDT WARD

CC: Counsel of Record

Supreme Court of Kentucky

2018-SC-000048-D
(2016-CA-001642)

CHARLIE COLEMAN,
ET AL. MOVANTS

v. CAMPBELL CIRCUIT COURT
2012-CI-00089

CAMPBELL COUNTY
PUBLIC LIBRARY
BOARD OF TRUSTEES RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: June 6, 2018.

/s/ John D. Minton, Jr.
CHIEF JUSTICE