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Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001259-MR

KNOX COUNTY, KENTUCKY;
AND CITY OF BARBOURVILLE,
KENTUCKY

APPELLANTS

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 08-CI-00190

CITY OF CORBIN, KENTUCKY;
AND JOE WHITE

APPELLEES

NO. 2009-CA-001308-MR

CITY OF CORBIN, KENTUCKY;
AND JOE WHITE

CROSS-APPELLANTS

v. CROSS-APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 08-CI-00190

KNOX COUNTY, KENTUCKY;
AND CITY OF BARBOURVILLE,
KENTUCKY

CROSS-APPELLEES

OPINION
AFFIRMING IN PART
REVERSING IN PART AND REMANDING

** ** * * * * *

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

ACREE, JUDGE: The Knox County Fiscal Court and City of Barbourville, defendants below, and the City of Corbin and Joe White, plaintiffs below, filed cross-appeals of an order of the Knox Circuit Court which granted in part and denied in part each of the parties' cross-motions for summary judgment. After careful consideration, we affirm in part, reverse in part, and remand for additional proceedings.

Facts and procedure

The factual and procedural circumstances of this dispute are so unusual we believe it highly unlikely they will arise again. Accordingly, we limit our analysis and holdings to the facts of this case.

A complete explanation of the circumstances underlying the present dispute requires discussion of another case which came before this Court, *City of Barbourville v. Knox County Fiscal Court*, 80 S.W.3d 765 (Ky. App. 2001), *discretionary review denied* (Ky. 2002). In 1999, Barbourville¹ and Knox County enacted ordinances² imposing occupational licensing fees on their residents.

¹ Barbourville is the county seat of Knox County.

² Knox County, Ky., An Ordinance Enacting and Imposing an Occupational License Fee Tax Based on Income and Net Profits Derived From the Exercise of Activities Necessary to Carry on Business, Trades, Occupations, and Professions in Knox County, Kentucky, With Said Tax to be

Barbourville did so pursuant to the authority of Kentucky Revised Statute(s) (KRS) 92.280; the authority for Knox County's tax came generally from KRS 67.083, though KRS 68.197 governs imposition of the fee for counties with populations of 30,000 or more. *Casey County Fiscal Court v. Burke*, 743 S.W.2d 26, 27 (Ky. 1988).

Precisely how these ordinances would apply to residents of both Barbourville and Knox County was unclear. KRS 68.197 requires that in counties with more than 30,000 residents, "persons who pay a county license fee and a license fee to a city contained in the county shall be allowed to credit their city license fee against their county license fee." KRS 68.197(7).³ The population of Knox County in 1999 was a matter of dispute. To avoid the possibility of what the city perceived as double-taxing its residents, Barbourville included the following language in its ordinance:

Pursuant to the provisions of KRS 68.197(4), all persons subject to a county license fee to Knox County, Kentucky and a city license fee to the City of Barbourville, Kentucky as set forth in this ordinance shall be allowed to credit their city license fee against their county license fee. No persons shall be subject to double taxation and in the event the credit for city license fee against the county license fee as set forth in KRS 68.197(4) is held to be invalid by a Court of competent jurisdiction, this ordinance shall be null and void.

Paid in to [sic] the Treasury of Knox County [sic] Kentucky (October 15, 1999); Barbourville, Ky. Ordinance 1999-6 (September 28, 1999).

³ The statute defines cities located in more than one county as "a city contained in the county." KRS 68.197(7). Corbin is located in both Knox County and Whitley County.

If Knox County was held to have fewer than 30,000 residents, then Barbourville's ordinance would not take effect. The city did not begin collecting the fee as imposed by the ordinance because of the dispute over the population.

Significantly, Barbourville residents also assigned their interest in the credit, to the extent to which they were entitled to a credit at all, to the city.

Barbourville brought suit against Knox County in early 2000, seeking a declaration that the county's population was greater than 30,000 so it could enforce its ordinance and Barbourville residents would receive a credit against their county licensing fees. The circuit court concluded the county's population was less than 30,000, relying upon 1990 federal census data, which it found conclusive. This Court reversed the circuit court in a 2001 opinion, holding that while census data was presumptive evidence of a county's population, it could be rebutted by other competent evidence. *City of Barbourville*, 80 S.W.3d at 770. The Supreme Court denied discretionary review on August 14, 2002.

On remand, the circuit court considered the 1990 census and additional evidence. It ultimately concluded Knox County's population in 1999 was at least 30,000 and, therefore, residents were entitled to a credit against their county taxes. Barbourville and Knox County entered into a settlement agreement as to the collection and allocation of licensing fees. This agreement provided Knox County would collect the revenue, place it in an escrow account, and pay Barbourville thirty-two percent of the first \$1,800,000 collected per year and twenty-five percent of revenue collected in excess of \$1,800,000.

Prior to the circuit court's ultimate resolution of the question of Knox County's 1999 population, however, the General Assembly passed a new statute to govern matters such as this, KRS 68.199. This statute provides, in relevant part,

(1) Notwithstanding the provisions of KRS 68.197(7), a county that enacts an occupational license fee under the authority of KRS 67.083 prior to attaining a population of thirty thousand (30,000) shall not be required to allow a credit against the county occupational license fee for an occupational license fee paid to a city within the county when it is determined that the population of the county exceeds thirty thousand (30,000).

.....

(4) For purposes of this section, the county population shall be determined based only on the official decennial census by the United States Bureau of the Census.

KRS 68.199. The 1990 federal census determined Knox County's population was 29,676; in 2000 the population was 31,795.⁴

Not until 2005 did the city of Corbin⁵ enact an occupational licensing fee ordinance⁶ pursuant to the authority granted in KRS 92.280. Unlike Barbourville's ordinance, Corbin's ordinance did not prohibit enforcement of the fee in the event it resulted in an occupational license tax at both the city and county levels; nevertheless, Corbin has not made efforts to collect the tax since the act was

⁴ The Knox Circuit Court determined the law of the case doctrine bound it to this Court's mandate to consider evidence in addition to the 1990 census irrespective of the new statute.

⁵ Corbin residents who live in the Knox County portion of the city will hereinafter be referred to as Corbin-Knox County residents.

⁶ Corbin, Ky. Ordinance 13-2005 (August 11, 2005).

passed. Also unlike the Barbourville case, Corbin-Knox County residents have not assigned their interest in a credit to the city.

Corbin and White brought a declaratory judgment action against Knox County in 2008 requesting that the circuit court find Corbin-Knox County residents were entitled to the credit established in KRS 68.197(4). Following cross-motions for summary judgment, in which both parties agreed the only outstanding issues were questions of law, the circuit court concluded the 2003 determination of Knox County's population was binding for purposes of Corbin's ordinance. It also ruled the 2003 settlement agreement between Knox County and Barbourville was valid.

Knox County appealed the circuit court's decision, and Corbin and White filed a cross-appeal. The parties' arguments on appeal are nearly identical to those they presented to the circuit court. Knox County maintains the matter is not justiciable and neither plaintiff had standing, and also argues on the merits that the doctrine of collateral estoppel should not apply to bind the parties to the 2003 determination that Knox County's population was at least 30,000 in 1999. The county further argues KRS 68.199(4) must apply retroactively so the 1990 census is conclusive evidence of its population when the ordinance was enacted. Corbin and White assert they meet all threshold requirements and the circuit court properly determined Knox County's population. Corbin appeals the circuit court's enforcement of the 2003 settlement agreement between Barbourville and Knox County, claiming it improperly allocates taxes collected from Corbin residents to Barbourville.

Standard of review

“The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.”

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing Kentucky Rule(s) of Civil Procedure (CR) 56.03). The parties agreed in the proceedings below, and do not dispute here, that there were no outstanding issues of fact. Our review of the remaining legal questions is *de novo*. See *Pathways, Inc. v. Hammons*, 1133 S.W.3d 85, 89 (Ky. 2003).

Justiciable case or controversy

KRS 418.040 permits a party to bring an action seeking a declaratory judgment, provided the plaintiff can “show that an actual, judiciable controversy exists[.]” *Mammoth Medical v. Bunnell*, 265 S.W.3d 205 at 209 (Ky. 2008). KRS 418.045 expressly permits certain types of cases to be brought: “Any person interested . . . whose rights are affected by statute, municipal ordinance, or other government regulation. . . provided always that an actual controversy exists with respect thereto, may apply for and secure a declaration of his right or duties[.]”

Knox County asserts there is no present controversy because Corbin has not yet attempted to collect the licensing fees provided for in the ordinance. However, pursuant to the holding of *Bank One v. Woodfield Financial Consortium*

LP, “the question is not one of a present controversy . . . but rather whether there is a *justiciable controversy* over present rights, duties, or liabilities.” *Bank One v. Woodfield Fin. Consortium LP*, 957 S.W.2d 276, 279 (Ky. App. 1997) (emphasis in original; internal quotation marks omitted) (citing *Dravo v. Liberty Nat’l Bank & Trust Co.*, 267 S.W.2d 95, 97 (Ky. 1954)). Put another way, an action presents a justiciable controversy if “the issue is an immediate, prominent, and non-academic concern to the public which the petitioning officials serve.” *Hammond v. Smith*, 930 S.W.2d 408, 410 (Ky. App. 1996)(citation and quotation marks omitted).

Corbin has a present right to collect the fee from Corbin residents pursuant to the authority of KRS 92.280. The question is whether taxpayers such as White have a right to a credit against the county tax for taxes paid to the city, and the extent of their tax liability to the city and county. This is a present controversy because the two potentially competing ordinances are in effect now, and White’s rights and obligations are therefore in dispute. This is not merely an abstract or academic question.

Another way to analyze whether a case presents a judiciable issue is to ask whether a ruling will terminate the controversy. *Bank One* at 281. “[T]he Court may refuse to exercise the power to declare rights, duties, or other legal relations in any case where a decision under it would not terminate the uncertainty or controversy which gave rise to the action[.]” *Mammoth Medical*, 265 S.W.3d at 210 (citing KRS 418.065). Here, resolution of the declaratory judgment action will terminate the controversy; it will tell Corbin-Knox County residents whether they

must pay taxes to both entities, or whether their Knox County occupational licensing fees can be offset by those paid to Corbin. It will also instruct Knox County in the application of its ordinance to Corbin residents. Resolving the issue furthers the purpose of “mak[ing] courts more serviceable to the people by way of settling controversies and affording relief from uncertainty and insecurity with respect to rights, duties[,] and relations.” *Id.* at 209 (citing KRS 418.080). In this case, “advance determination will minimize the risk of wrong action by the parties[.]” *McConnell v. Commonwealth*, 655 S.W.2d 43, 45 (Ky. App. 1983) (citing *Combs v. Matthews*, 364 S.W.2d 647 (Ky. 1963)).

The declaratory judgment action therefore presents a justiciable controversy, and the Knox Circuit Court properly entertained the action.

Standing

To have standing to bring suit, “[a] party plaintiff must have a real, direct, present[,] and substantial right or interest in the subject matter of the controversy.” *Winn v. First Bank of Irvington*, 581 S.W.2d 21, 23 (Ky. App. 1978). That interest must be more than a mere expectancy. *See id.*

White has standing. At issue is whether he, as a resident of both Corbin and Knox County, is required to pay occupational licensing fees to both the city and the county or only to the city. There is uncertainty as to White’s rights and duties. This is more than a mere expectancy, and the circuit court properly ruled White has standing in this case.

Corbin, on the other hand, does not have even an expectancy. The determination whether Knox County's population was more or less than 30,000 in 1999 will in no way affect Corbin's ability to impose its ordinance and collect occupational licensing fees. Simply put, there is nothing for Corbin to gain or lose in the resolution of this case. Corbin does not have standing.

The city argues, however, that it has standing to either 1) defend the general economic well-being of Corbin, which it believes is at risk in the event its citizens are taxed by both the city and the county, or 2) promote the general policy of the Commonwealth which opposes double taxation of citizens. Any such interest, however, is vague and remote. The cases Corbin has cited on these points do not confer standing upon the city.

Corbin finally argues the circuit court properly determined the city had standing because the instant case is not distinguishable from *City of Barbourville, supra*. There are, however, two important facts which distinguish these cases. First, the language of Barbourville's ordinance preventing enforcement if no credit against Knox County taxes was available placed it in direct conflict with Knox County's ordinance. The conflict could not be resolved until a court determined the county's population. Corbin's ordinance has no such provision preventing its enforcement. Second, the citizens of Barbourville assigned their interest in a credit against Knox County taxes to the city. This created a financial interest for Barbourville in the outcome of the action, which

gave the city standing in that case. Corbin has no such financial interest in the outcome of the instant case.

Because of these factors, Corbin lacks standing. Accordingly, our analysis proceeds with respect to White only.

Collateral estoppel

Knox County asserts the circuit court erred in holding the county was bound by that court's 2003 determination that the population of Knox County was greater than 30,000 in 1999. White contends the circuit court properly bound Knox County to the prior ruling.

Collateral estoppel, also called issue preclusion, "bars the parties from relitigating any issue actually litigated and finally decided in an earlier action." *Yeoman v. Commonwealth, Health Policy Board*, 983 S.W.2d 459, 465 (Ky. 1998). For a party to successfully assert the doctrine, he must show: "(1) identity of issues; (2) a final decision or judgment on the merits; (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; [and] (4) a prior losing litigant." *Moore v. Commonwealth*, 954 S.W.2d 317, 319 (Ky. 1997) (citing *Sedley v. City of West Buechel*, 461 S.W.2d 556 (Ky. 1970)). The fact that White was not a party to the previous action does not preclude him from invoking the doctrine of collateral estoppel against Knox County, provided the elements are met. *See Board of Education of Covington v. Gray*, 806 S.W.2d 400, 402 (Ky. App. 1991).

Because there is no identity of issues, however, the elements of collateral estoppel have not been met.⁷ The issue before the circuit court in *Barbourville, supra*, was how to calculate the county's population in the absence of any clear rule, statutory or otherwise. The issue in the instant case is how to calculate Knox County's population in light of clear statutory instruction and considering whether the statute must be applied retroactively. The enactment of KRS 68.199 changed the inquiry before the circuit court, and thus the issues presented in the two cases are not identical. Knox County is not bound by the population determination in the 2003 case.

Retroactive effect of KRS 68.199

Knox County believes KRS 68.199(4) should apply retroactively to determine the calculation of the county's population at the time the ordinance was passed, 1999. Corbin responds that the statute neither expresses any retroactive intent of the General Assembly nor serves a remedial function and, therefore, should not apply retroactively to govern the assessment of the county's population.

KRS 446.080(3) provides, “[n]o statute shall be construed to be retroactive, unless expressly so declared.” Statutes which are remedial, as opposed to substantive, may be applied retroactively despite the absence of express declaration.⁸ Remedial statutes provide for “no more than the expansion of an

⁷ We therefore need not address Knox County's argument that the matter was not finally decided on the merits.

⁸ The Supreme Court has expressed the rule for retroactive application of remedial statutes in various ways. *See, e.g., Commonwealth of Kentucky Department of Agriculture v. Vinson*, 30 S.W.3d 162, 168 (Ky. 2000) (“[T]here is a strong presumption that statutes operate prospectively and that retroactive application of statutes will be approved only if it is absolutely certain the

existing remedy without affecting the substantive basis, prerequisites, or circumstances giving rise to the remedy.” *Kentucky Insurance Guaranty Association v. Jeffers*, 13 S.W.3d 606, 609 (Ky. 2000). Substantive statutes, on the other hand, “change and define out-of-court rights, obligations, and duties of persons in their transactions with others[.]” *Commonwealth of Kentucky Department of Agriculture v. Vinson*, 30 S.W.3d 162 at 168 (Ky. 2000).

KRS 68.199 contains no express provision that it is to be applied retroactively.

The parties have focused their arguments on subpart (4) of this statute and analyzed its remedial or substantive nature standing alone. On that basis, it appears KRS 68.199(4) may be remedial because it affects only in-court determinations of a county’s population, and does not, in itself, give rise to new rights or obligations.

Subpart (4), however, cannot be read out of the context of the entire statutory section. KRS 68.199(1) in particular reveals the statute is substantive. This subpart creates a vested right in the counties: the right to continue to collect the tax against city residents who also pay county taxes, even after the county has attained the 30,000 residents contemplated by KRS 68.197. KRS 68.199(1) also creates a duty for city-county residents: their obligation to pay the full occupational

legislature intended such a result. This is particularly true when the legislation is substantive and not remedial[.]”); *see also Kentucky Insurance Guaranty Association v. Jeffers*, 13 S.W.3d 606, 609 (Ky. 2000) (“The general rule is that a statute, even though it does not expressly state, has retroactive application provided the statute is remedial.”). Because we find the statute is not remedial, however, the varied formulations of the rule do not require reconciliation.

licensing fee to the county will continue even after the population reaches 30,000. These were substantive changes in the law. Subpart (4), which begins with the limiting phrase, “[f]or purposes of this section,” merely provides a method by which one calculates a county’s population for purposes of KRS 68.199 as a whole.

KRS 68.199 is neither retroactive nor remedial.

Judicial notice

White has requested that we take judicial notice of population data from the U.S. Census Bureau. Knox County’s only response to that request is that the actual population of Knox County is irrelevant to the legal issues now before us. Having determined that neither KRS 68.199 nor the circuit court’s 2003 ruling resolves this matter, we must assess the propriety of taking judicial notice of the proffered facts.

Our current Rules of Evidence permit an appellate court to take judicial notice of certain facts, although “notice should be used sparingly on appeal in cases where a party did not make a request for judicial notice before the trial court.” *Newberg v. Jent*, 867 S.W.2d 207, 210 (Ky. App. 1993) (citing Robert G. Lawson, *The Kentucky Evidence Law Handbook* §1.00, p. 13 (3rd ed. 1993)). Ordinarily, this will require a finding that it was palpable error for the trial court to fail to take judicial notice of a fact, even though no party made such a request. *Id.* A finding of palpable error, however, is not a prerequisite to taking judicial notice on appeal. *See Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 264 (Ky. App.

2005). In *Doe*, now-Chief Justice Minton stated, “The propriety of taking notice in a given situation would depend first of all upon whether the fact in question is indisputable and secondly upon whether the fact is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *Id.* (quotations omitted). This Court then took judicial notice “of the federal clerk’s docket sheets for [previous, related cases.]” *Id.* at 265.

The information which White contends warrants taking judicial notice, however, would get this Court no closer to resolving the dispute. White has presented a document printed from the Census Bureau’s website which provides that bureau’s estimates of the population of Kentucky counties as of July 1, 1999. It may therefore be indisputable that the Census Bureau’s *estimate* of Knox County’s population at that time was 31,967.⁹ That does not make indisputable the conclusion White wishes us to draw – that Knox County’s *actual* population was at least 30,000 in 1999. In the absence of indisputable evidence of the ultimate fact, making a factual conclusion about the county’s actual population based on the Census Bureau’s estimates would require us to usurp the role of the trial court. We will not do so. Instead, we are required to remand this matter to the circuit court for a factual determination of Knox County’s population as of the date it passed its occupational licensing fee ordinance.

⁹ It may not be indisputable that the county’s estimated population on that date was 31,967. This Court’s own review of Census Bureau records posted online, which we conducted pursuant to *Doe, supra*, reveals another figure from the same agency: 31,582.

Since neither the circuit court's 2003 determination of Knox County's population nor KRS 68.199(4) controls this matter, the proper inquiry for the circuit court on remand is the same as it was in 2003. The parties are permitted to put on evidence including, but not limited to, population data from the 1990 federal census.

We recognize that our resolution of this matter will likely seem unusual and, perhaps, a redundancy and waste of judicial and legal resources. Perhaps it will prove to be so, but we are constrained to apply certain rules of jurisprudence to uncertain and unusual circumstances. Even though we are convinced that KRS 68.199 is *not remedial*, the timing and the legislative history surrounding KRS 68.199 and related statutes suggests it was *reactionary* to *Barbourville, supra*. We note, however, that had the legislature simply included language of retroactivity when it enacted KRS 68.199, the issues before us would never have arisen. Unfortunately for the parties and the citizens of Knox County, the legislature chose not to do so.

We believe it unlikely that this fact pattern will repeat itself in another county of this Commonwealth. Before it does, however, we repeat advice offered in the past when equally unusual circumstances pitted a county and a city against one another: "If a remedy is needed, the Legislature may provide one."

Commissioners for Courthouse Dist. of Campbell County v. City of Newport, 29 Ky.L.Rptr. 649, 94 S.W. 629, 630 (1906).

Barbourville-Knox County settlement agreement

Finally, White has appealed the circuit court's determination that the settlement agreement between Barbourville and Knox County is lawful. He contends the agreement effectively permits Barbourville to tax Corbin residents. We disagree.

A settlement is merely “[a]n agreement ending a dispute or lawsuit[.]” BLACK’S LAW DICTIONARY (8th Ed. 2004). It does not bind third parties. 15A CJS *Compromise & Settlement* §1 (2010) (citing *Sinclair Oil Corp. v. Abraham*, 291 F.3d 822 (Fed. Cir. 2002)). Counties may therefore enter into settlement agreements without affecting the rights of persons not party to the lawsuit.

The agreement at issue here does not attempt to impose any tax upon Corbin residents which they are not already obligated to pay pursuant to Knox County's ordinance. Once Knox County collects taxes from its citizens – even those who are residents of Corbin – it may allocate them as it sees fit, provided, of course, that the expenditures are justified by the relevant constitutional and statutory guidelines. This includes applying them to Barbourville's outstanding claim to the fees the county collects. Knox County's settlement agreement with Barbourville therefore does not constitute taxation of Corbin citizens; the source of the obligation of Corbin citizens to pay the tax is the Knox County ordinance. The circuit court properly granted Knox County's motion for summary judgment on this issue.

Conclusions

Although this dispute presents a justiciable controversy, only taxpayer Joe White has standing to pursue it. Collateral estoppel does not require that the Knox Circuit Court's 2003 ruling regarding the county's population govern the population determination in this case. Neither, however, is the issue determined by KRS 68.199(4), which does not have retroactive effect. This means the parties must present evidence to the circuit court of the county's population in 1999. Finally, the 2003 settlement agreement between Barbourville and Knox County is not void because it does not impermissibly permit one municipality to impose taxes upon citizens of another. We therefore reverse in part, affirm in part, and remand for additional proceedings consistent with this opinion.

ALL CONCUR.

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