

ORIGINAL

IN THE SUPREME COURT OF OHIO

PANTHER II TRANSPORTATION)
INC.)

CASE NO. 2012-1589 and 2012-1592

APPEAL FROM THE MEDINA
COUNTY COURT OF APPEALS
NINTH JUDICIAL DISTRICT
CASE NOS. 11CA0092-M,
11CA0093-M

Plaintiff/Appellee,)

vs.)

VILLAGE OF SEVILLE BOARD)
OF INCOME TAX REVIEW)

and)

INCOME TAX ADMINISTRATOR)
NASSIM M. LYNCH)
AND THE CENTRAL COLLECTION))
AGENCY)

Defendants/Appellants.)

APPELLANT VILLAGE OF SEVILLE BOARD OF INCOME TAX
REVIEW'S
MOTION FOR RECONSIDERATION OF THE SUPREME COURT OF
OHIO'S DECISION ISSUED MARCH 19, 2014

RECEIVED
MAR 27 2014
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAR 27 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Theodore J. Lesiak (0041998) (COUNSEL OF RECORD)
Roderick Linton Belfance LLP
50 South Main Street, 10th Floor
Akron, Ohio 44308
(330) 434-3000 Telephone
(330) 434-9220 Fax
tlesiak@rlbllp.com

COUNSEL FOR APPELLANT,
VILLAGE OF SEVILLE BOARD OF INCOME TAX REVIEW

Barbara A. Langhenry
Linda L. Bickerstaff (COUNSEL OF RECORD)
City of Cleveland Law Department
205 W. St. Clair Avenue
Cleveland, Ohio 44113

COUNSEL FOR APPELLANT,
TAX ADMINISTRATOR NASSIM M. LYNCH
AND THE CENTRAL COLLECTION AGENCY

James F. Lang (COUNSEL OF RECORD)
The Calfee Building
Calfee Halter & Griswold LLP
1405 E. 6th Street
Cleveland, Ohio 44114

COUNSEL FOR APPELLEE
PANTHER II TRANSPORTATION, INC.

John L. Alden
AldenLaw
One East Livingston Avenue
Columbus, Ohio 43215

COUNSEL FOR *AMICUS CURIAE*
THE OHIO TRUCKING ASSOCIATION

**Phillip Hartman
Ice Miller LLP
250 West Street
Columbus, Ohio 43215**

**COUNSEL FOR *AMICUS CURIAE*
THE OHIO MUNICIPAL LEAGUE**

**Richard C. Farrin
ZAINO HALL & FARRIN LLC
41 South High Street, Suite 3600
Columbus, Ohio 43215**

**COUNSEL FOR *AMICUS CURIAE*
UNITED PARCEL SERVICE, INC.**

**Michael M. Briley
SHUMAKER, LOOP & KENDRICK LLP
1000 Jackson Street
Toledo, Ohio 43604**

**COUNSEL FOR *AMICUS CURIAE*
THE DUMP TRUCK CARRIERS CONFERENCE**

**Marc S. Blubaugh
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
41 South High Street, 26th Floor
Columbus, Ohio 43215**

**COUNSEL FOR *AMICUS CURIAE*
CON-WAY FREIGHT, INC.**

TABLE OF CONTENTS

Page

MOTION FOR RECONSIDERATION OF THE SUPREME COURT OF OHIO'S DECISION AFFIRMING THE MEDINA COUNTY COURT OF APPEALS ISSUED MARCH 19, 2014.....	1
CONCLUSION	5
CERTIFICATE OF SERVICE.....	7

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<i>Angell v. City of Toledo</i> , 153 Ohio St. 179, 91 N.E.2d 250 (1950).....	4
<i>Cincinnati Bell Telephone Co. v. City of Cincinnati</i> , 81 Ohio St. 3d 599, 693 N.E.2d 212 (1998).....	3, 4
<i>Lutheran Book Shop v. Bowers</i> , 164 Ohio St. 359, 131 N.E. 2d 219 (1955).....	1
<i>Panther II Transp., Inc. v. Seville Bd. Of Income Tax Rev.</i> , --- Ohio St. 3d ---, 2014-Ohio-1011, --- N.E. 2d --- (2014).....	3, 5
<i>Slingluff v. Weaver</i> , 66 Ohio St. 621, 64 N.E. 574 (1902).....	2
<i>State ex rel. Zielonka v. Carrel</i> , 99 Ohio St. 220, 124 N.E. 134 (1919).....	3, 5, 6
<i>Tomasik v. Tomasik</i> , 111 Ohio St. 3d 481, 2006-Ohio-6109, 857 N.E. 127	2

CONSTITUTIONAL PROVISIONS; STATUTES

<i>Ohio Constitution, Article XII, Section 8</i>	4
<i>Ohio Constitution, Article XII, Section 9</i>	4
<i>Ohio Constitution, Article XIII, Section 6</i>	4
<i>Ohio Constitution, Article XVIII, Section 3</i>	1, 4
<i>Ohio Constitution, Article XVIII, Section 13</i>	4
<i>1923 Am H.B. 474</i>	5, 6
<i>G.C. 614-94</i>	5
<i>G.C. 614-98</i>	5

<i>R.C. 715.013</i>	3
<i>R.C. 718.01</i>	3,6
<i>R.C. 4921.18</i>	5,6
<i>R.C. 4921.19</i>	1
<i>R.C. 4921.25</i>	2,3,4,5,6

**APPELLANT VILLAGE OF SEVILLE BOARD OF INCOME TAX REVIEW'S
MOTION FOR RECONSIDERATION OF THE SUPREME COURT OF OHIO'S
DECISION ISSUED MARCH 19, 2014**

Now comes the Appellant, Village of Seville Board of Income Tax Review (“Seville”), and hereby moves this Court to reconsider it’s decision to Affirm the Medina County Court of Appeals. Seville incorporates the Appellants’ and the Ohio Municipal League’s (“OML”) Memorandums in Support of Jurisdiction, and the Appellants’ and OML’s Briefs on the Merits, into this Motion for Reconsideration.

The Public Utilities Commission of Ohio (“PUCO”) registers more than 58,000 general freight carriers, more than 2,500 hazardous materials transporters, more than 1,000 towing companies and more than 300 household goods movers. Even tiny Seville, with a 2010 population of 2,296 has had two major Motor Transportation Companies (“MTC”) including Panther II Transportation, Inc. (“Panther”) within its corporate limits. Panther has an extensive history of filing and paying municipal net profits tax in both Seville and the City of Medina. Seville’s tax administrator, Appellant, The Central Collection Agency (“CCA”) is also the tax administrator for Ohio’s second largest municipality, the City of Cleveland. CCA states that the City of Cleveland charges and collects municipal net profits taxes from MTCs within its corporate limits.

The majority decision affirming the Medina County Court of Appeals seriously erodes the Home Rule taxing powers granted to Ohio local governments in *Ohio Constitution, Article XVIII, Section 3*, as it prohibits the municipal taxing of net profits of one of Ohio’s largest industries.

Tax exemption statutes must be strictly construed in order to preserve equality in the

burden of taxation. *Lutheran Book Shop v. Bowers*, 164 Ohio St. 359, 362, 131 N.E. 2d 219 (1955). In interpreting a statute, ‘the object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it’. *Tomasik v. Tomasik*, 111 Ohio St. 3d 481, 2006-Ohio-6109, 857 N.E. 127 ¶ 13, quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph one of the syllabus. This court may engage in statutory interpretation when the statute under review is ambiguous. *Id.* ‘But the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. *Tomasik* at ¶ 14. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. *Id.* That body should be held to mean what it has plainly expressed, and hence no room is left for construction.’ *Id.*

There is no constitutional provision that directly prohibits both the state and municipalities from occupying the same area of taxation at the same time. *Cincinnati Bell Telephone Co. v. City of Cincinnati*, 81 Ohio St. 3d 599, 607, 693 N.E.2d 212 (1998). Rather, the Constitution presumes that both the state and municipalities may exercise full taxing powers, unless the Ohio General Assembly has acted expressly to preempt municipal taxation. *Id.*

The majority concludes that the General Assembly in enacting *R.C. 4921.25* intended the “broadest possible preemption of local taxing power”. *Panther II Transp., Inc. v. Seville Bd. Of Income Tax Rev.*, --- Ohio St. 3d ---, 2014-Ohio-1011, --- N.E. 2d --- (2014) ¶ 14. The majority also concludes *Cincinnati Bell, supra*, does not require *R.C. 4921.25* to be specific when preempting municipal net profits taxation, but instead can generally preempt all municipal taxes unless there are exceptions specifically stated in the statute, such as the exception of the “general

property tax”. *Id.* at ¶ 15.

To reach the decision that *R.C. 4921.25* preempts the imposition of municipal net profits taxes on MTCs, the majority, without citing the doctrine, actually applies the doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other). The majority concludes that property taxes were excluded from the application of *R.C. 4921.25*. As a result, the Ohio General Assembly could have chosen to exclude other taxes such as the net profits tax imposed by Seville, but instead chose not to exclude such taxes.

However, in order to apply this doctrine to *R.C. 4921.25*, it would be essential for the Ohio General Assembly to have contemplated the existence of municipal income and net profits tax in the future. At the time *R.C. 4921.25* was enacted in 1923, no municipal income and net profits tax existed in Ohio or anywhere else in the United States. Moreover, such taxes not only did not exist but were illegal and unconstitutional pursuant to the holding in *State ex rel. Zielonka v. Carrel*, 99 Ohio St. 220, 124 N.E. 134 (1919). It would also be essential for the Ohio General Assembly to have knowledge that *Zielonka, supra*, would be overruled by the Supreme Court in the future.

Moreover, if the doctrine of *expressio unius est exclusio alterius* is applicable to the interpretation *R.C. 4921.25*, the doctrine is also applicable to the interpretation of *R.C. 718.01(F)* and *R.C. 715.013*. Both of these statutes specifically address express exemptions from municipal income and net profits tax, including other PUCO regulated industries. Yet neither *R.C. 718.01(F)* nor *R.C. 715.013* specifically excludes MTCs from the imposition of municipal income and net profits tax. Pursuant to the doctrine of *expressio unius est exclusio alterius*, the Ohio General Assembly’s failure to address MTCs in *R.C. 718.01(F)* and *R.C. 715.013* implies

that the Ohio General Assembly expressly included MTCs as entities subject to municipal income and net profits tax.

Furthermore, the doctrine of *expressio unius est exclusio alterius* cannot be a mechanism to interpret *R.C. 4921.25*. The use of the doctrine as an aid of statutory interpretation is directly in contravention of the *Home Rule Amendment* of the *Ohio Constitution, Article XVIII, Section 3*, as well as the holding of *Cincinnati Bell Telephone Co, supra*. The use of the doctrine presumes an implication rather than an expression. A state imposed exclusion to the constitutional power of a municipality to levy net profits tax upon an MTC must be expressly, specifically stated and not implied through an omission in *R.C. 4921.25*.

In a footnote, the majority also states that the syllabus of *Angell v. City of Toledo*, 153 Ohio St. 179, 184, 91 N.E.2d 250, 253 (1950) has no application to the instant case as the Court in *Angell, supra*, was merely stating that “no general limitation of the local power to impose income taxes had been enacted by the General Assembly as of the date on which *Angell, supra*, was decided”. *Panther II, supra* at fn. 4.

However, paragraph 2 of the syllabus of *Angell, supra*, specifically states:

The state has not pre-empted the field of income taxation authorized by Sections 8 and 9 of Article XII of the Constitution, and the General Assembly has not, under authority of Section 13 of Article XVIII or Section 6 of Article XIII of the Constitution, passed **any** law limiting the power of municipal corporations to levy and collect income taxes. (emphasis added)

The only authority by which the General Assembly could act to preempt the field of municipal income taxes is through the Constitutional power granted in *Ohio Constitution, Article XVIII, Section 13* or *Article XIII, Section 6*. It is clear that this Court in *Angell, supra*, held that

no laws had been passed at the time of *Angell* limiting municipal power to impose income taxes. In fact, there could have been no laws passed limiting the imposition of municipal income tax until *Angell, supra* overruled *Zielonka, supra*.

The majority also neglects to interpret the intent of *1923 Am H.B. 474* which enacted *R.C. 4921.25* formerly *G.C. 614-98* in 1923. The preamble to *1923 Am H.B. 474* provides in the relevant part:

To amend...and enact...sections ... of the General Code, defining motor transportation companies, conferring jurisdiction upon the Public Utilities Commission over the transportation of persons or property for hire in motor vehicles, and providing for the supervision and regulation of such transportation, for the enforcement of provisions of this act and for the punishment of violations thereof, and **providing for the taxing of motor propelled vehicles.** (Emphasis added).

The General Assembly, through the clear language of the purpose of the statute, intended to provide for the taxing of motor propelled vehicles and to preempt the municipal taxation of such vehicles. *See, also, R.C. 4921.18*. The purpose to prohibit municipal income or net profits taxation was not addressed in *1923 Am H.B. 474* as income and net profits taxes were unconstitutional, illegal and not in existence in 1923.

CONCLUSION

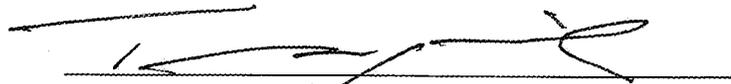
It is clear that this Court's decision in *Panther II, supra* and the decisions of the Medina County Court of Appeals and the Ohio Board of Tax Appeals are unreasonable and unlawful and in violation of Seville's Home Rule powers under the Ohio Constitution. These decisions hold that *R.C. 4921.25* expressly preempts Seville's ability to impose an income and net profits tax upon Panther.

However, *R.C. 4921.25*, originally enacted in 1923, does not expressly prohibit net income and profits tax upon a MTC. In 1923, there was no municipal income tax in existence in Ohio or the United States. In addition, this Court in 1919 held that municipal income and net profits tax was illegal and unconstitutional. *See, Zielonka, supra*. Therefore, it was impossible for the Ohio General Assembly to expressly prohibit municipal income and net profits taxes upon a MTC, as municipal income and net profits taxes were not in the contemplation of the Ohio General Assembly at the time *R.C. 4921.25* was enacted.

Furthermore, an unambiguous reading of *R.C. 4921.18*, *R.C. 4921.25*, in context with the purpose clause in the legislative history of *1923 Am H.B. 474*, clearly shows that *R.C. 4921.25* was enacted to preempt a municipalities' ability to tax motor propelled vehicles and not a MTC's income and net profits. Absent a specific and express act of the Ohio General Assembly preempting MTCs from municipal income and net profits taxes, Panther is subject to Seville's net profits tax pursuant to *R.C. 718.01(D)(1)*.]

Accordingly, this Court should reconsider its decision in *Panther II, supra*. The decision of the Ohio Board of Tax Appeals and the Medina County Court of Appeals must be reversed.

Respectfully submitted,



THEODORE J. LESIAK (#0041998)
Counsel of record for Appellant Village
of Seville Board of Income Tax Review
RODERICK LINTON BELFANCE LLP
50 South Main Street, 10th Floor
Akron, Ohio 44308
(330) 434-3000 Fax (330) 434-9220
E-Mail Address: tlesiak@rlblp.com

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Reconsideration was sent by regular US Mail this 26th day of March, 2014, to the following:

Barbara A. Langhenry
Linda L. Bickerstaff
CITY OF CLEVELAND LAW DEPARTMENT
205 W. St. Clair Avenue
Cleveland, Ohio 44113
Attorneys for Defendant/Appellant
Tax Administrator Nassim M. Lynch
And the Central Collection Agency

James F. Lang
CALFEE HALTER & GRISWOLD LLP
The Calfee Building
1405 East 6th Street
Cleveland, Ohio 44114
Attorney for Plaintiff/Appellee
Panther II Transportation, Inc.

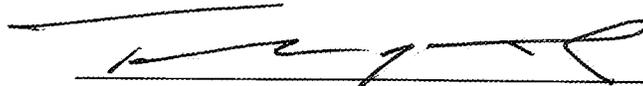
John L. Alden
ALDENLAW
One East Livingston Avenue
Columbus, Ohio 43215
Attorney for *Amicus Curiae*
The Ohio Trucking Association

Phillip Hartman
ICE MILLER LLP
250 West Street
Columbus, Ohio 43215
Attorney for *Amicus Curiae*
The Ohio Municipal League

Richard C. Farrin
ZAINO HALL & FARRIN LLC
41 South High Street, Suite 3600
Columbus, Ohio 43215
Attorney for *Amicus Curiae*
United Parcel Service, Inc.

Michael M. Briley
SHUMAKER, LOOP & KENDRICK LLP
1000 Jackson Street
Toledo, Ohio 43604
Attorney for *Amicus Curiae*
The Dump Truck Carriers Conference

Marc S. Blubaugh
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
41 South High Street, 26th Floor
Columbus, Ohio 43215
Attorney for *Amicus Curiae*
Con-Way Freight, Inc.



Theodore J. Lesiak 0041998