Supreme Court of Ohio Clerk of Court - Filed September 01, 2015 - Case No. 2014-1769

IN THE SUPREME COURT OF OHIO

TOLEDO CITY SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,	:	Case No. 2014-1769
Appellees,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	Court of Appeals Case No. 14AP-93 14AP-94 14AP-95
STATE BOARD OF EDUCATION OF OHIO, *et al.*,	:	
Appellants.	:	

BRIEF OF AMICUS CURIAE COUNTY COMMISSIONERS ASSOCIATION OF OHIO IN SUPPORT OF APPELLEES

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I. INTERESTS OF *AMICUS CURIAE*

Amicus curiae the County Commissioners Association of Ohio ("CCAO") respectfully submits this brief of amicus curiae in support of Appellees, pursuant to S.Ct.Prac.R. 16.06(A).

CCAO is a private, not-for-profit statewide association of county commissioners founded in 1880 to promote the best practices and policies in the administration of county government for the benefit of Ohio residents. CCAO's membership consists of the county commissioners of eighty-six of Ohio's counties as well as the Summit and Cuyahoga County Executives and County Council members. CCAO presents this brief based upon its shared interest with the Appellees in the reasonable reliance on the receipt of funds appropriated by the General Assembly of the State of Ohio (the "General Assembly") for the purpose of carrying out certain statutory duties delegated to its member counties, such as construction and maintenance of public infrastructure, child protective functions, the administration of justice and public safety and numerous other governmental functions. In the view of CCAO, it is well-settled under Ohio law that Article II, Section 28 of the Ohio Constitution (the "Retroactivity Clause") applies to political subdivisions of the State of Ohio. Further, in the view of CCAO, Ohio counties must be able to reasonably rely on funds distributed to them by the State for the purpose of carrying out those counties' statutorily delegated duties and, by extension, the State's policy objectives.

CCAO appreciates the opportunity to submit this brief and urges this Court to affirm the decision of the Tenth District Court of Appeals (the "Tenth District").

II. SUMMARY OF ARGUMENT

This Court's affirmation of the Tenth District's decision is of significant importance to CCAO and its member counties, as a reversal would stand as a harbinger of uncertainty with regard to the ability of such counties to administer themselves as effective arms of the State.

First, in the view of CCAO, this Court should definitively establish that the Retroactivity Clause protects political subdivisions of the State to the same extent to which it protects the rights of individuals. Appellants propose that this question is not yet settled. However, their proposition is a result of a loose interpretation of Ohio case law on the issue; case law which gave the Tenth District no pause in declaring that the Retroactivity Clause prohibits the General Assembly from enacting laws that retroactively impair vested rights of political subdivisions.

Second, as a matter of public policy, CCAO's member counties must be able to reasonably rely on State funds in order to effectively perform the governmental functions that have been statutorily delegated to them by the General Assembly. In order to so, Ohio counties must be able to rely on and budget those funds appropriated to them by the General Assembly to support such functions. Otherwise, contracts and other obligations incurred in the performance of those functions may necessarily be terminated, resulting in the payment of extraordinary fees by Ohio counties and, thereby, the taxpayers of the State. If the General Assembly is permitted to pass retrospective laws of the type at issue in this case, the ability of Ohio counties to budget expenditures related to those delegated functions becomes an uncertainty under which the effective performance of those functions, and therefore the accomplishment of the State's objectives, is perpetually in jeopardy.

III. ARGUMENT

A. The Retroactivity Clause Protects Political Subdivisions Of The State Of Ohio.

Appellants have devoted a considerable amount of their brief in this case to the proposition that the Retroactivity Clause has no applicability to political subdivisions of the State of Ohio, such as CCAO's member counties. However, in line with over a century of this Court's jurisprudence, the Tenth District accurately held that the Retroactivity Clause prohibits the

General Assembly from enacting laws that retroactively impair vested rights of political subdivisions. *See Toledo City Sch. Dist. Bd. of Educ. v. State Board of Educ.*, 2014-Ohio-3741, ¶ 47 (10th Distr. 2014); *Commissioners v. Rosche Bros.*, 50 Ohio St. 103 (1893); *Cleveland v. Zangerle*, 127 Ohio St. 91 (1933); *State ex rel. Crotty v. Zangerle*, 133 Ohio St. 532 (1938); *State ex rel. Outcalt v. Guckenberger*, 134 Ohio St. 457 (1938); *Perk v. Euclid*, 17 Ohio St.2d 4 (1969); and *Bd. of Education of the Cincinnati Sch. Dist. v. Hamilton County Bd. of Revision*, 91 Ohio St.3d 308 (2000).

In *Rosche*, the General Assembly enacted a statute requiring county commissioners to refund taxes that were paid based upon an erroneous form. The commissioners claimed that recovery under the statute could not be applied retroactively, and this Court agreed, stating that the statute "imposed upon [the] county an obligation…that did not attach to the transaction when it occurred" and that the General Assembly had "transcended its constitutional powers." *Rosche*, 51 Ohio St. at 113. Additionally, in *Zangerle*, a city brought an action against certain county officials in their official capacities to enjoin the distribution of intangible taxes in accordance with newly amended legislation claimed to be unconstitutionally retroactive against the city. This Court declared that the provisions of the legislation, "so far as they relate to the future distribution of the proceeds of taxes, are not retroactive, but prospective, in character…nor can it be said that the city had any contractual obligation with the state which was impaired by" the legislation. *Zangerle*, 127 Ohio St. at 93. Though finding the law prospective in nature, this Court did not hesitate to apply the Retroactivity Clause in a case where all parties were political subdivisions of the State.

Two similar cases decided by this Court, *Outcalt* and *Crotty*, also support the applicability of the Retroactivity Clause to protect the rights of political subdivisions. The cases

dealt with provisions of related legislation enacted by the General Assembly. In *Outcalt*, this Court interpreted the provisions of the Whittemore Acts, which authorized the remittance or abrogation of tax penalties and interest upon the payment of current taxes and the entering into of an agreement regarding delinquent taxes. A county prosecuting attorney sought to compel a county auditor and treasurer to collect the penalties, interest and other charges on delinquent amounts related to certain real estate, in contravention to the Whittemore Acts. This Court ruled that the Retroactivity Clause, as applied to Ohio counties, did not bar the implementation of the Whittemore Acts, at least to the extent the provisions thereof were prospective in nature. *Id*. at 462-463. The decision in *Crotty* is based on an interpretation of the Ogrin Act, which provided that whenever penalties or interest charges were paid, and an act of the General Assembly provided for the remission or abrogation of such penalties and interest (i.e., the Whittemore Acts), that those who had made such payments could obtain a refund. *Crotty*, 133 Ohio St. at 540. Again applying the Retroactivity Clause to Ohio counties, this Court held that, "in so far as [the Ogrin Act] imposes an obligation on the county…on account of past transactions, [it] is retroactive and in conflict with" the Ohio Constitution. *Id.* at 534.

Further, in *Perk*, 17 Ohio St.2d 4, the statute at issue was an uncodified temporary statute which provided that where the State or a political subdivision had acquired real property prior to a certain date preceding the effective date of the legislation, if the property is used for public purposes and has not been placed on the tax-exempt list, the State or political subdivision may file and the county board of revision must grant an application for exemption from and remission of delinquent taxes, penalties and interest from the date of acquisition. In accordance with this legislation, a city sought exemption and remission of taxes on property it owned. The county auditor challenged the constitutionality of the law, and this Court held that the legislation was

unconstitutionally retroactive against the county, quoting *State ex rel. Struble v. Davis*, 132 Ohio St. 555, syl. ¶ 4 (1937), in stating that such laws, "in so far as they provide for the exemption of taxes, the assessment of which had been completed at the time such [act became law], are violative of the provisions of" the Retroactivity Clause. *Perk*, 17 Ohio St. at 7. In another case between two political subdivisions, a school district appealed the ruling of the Ohio Board of Tax Appeals, claiming that a statute authorizing a second complaint for valuation with a county board of revision within the same triennial period was unconstitutionally retroactive as applied to the school district. *See Hamilton County Bd. of Revision*, 91 Ohio St.3d 308. In that case, this Court held that the statute at issue violated of the Retroactivity Clause as applied to the school district. *Id.* at 317.

In all of these cases, this Court did not hesitate to apply the Retroactivity Clause to protect political subdivisions of the State. In fact, there is no more important application of the Retroactivity Clause than to protect from the remission or refunding of moneys paid into the treasuries of political subdivisions for application towards the public purposes for which such political subdivisions were established. In contrast, Appellants claim that the question of applicability of the Retroactivity Clause to political subdivisions is not yet settled, and in doing so have relied on either out-of-state cases or cases of this Court where no consideration is given to the distinction Appellant is trying to make, to wit, that the Retroactivity Clause applies only to individuals and, when it has been applied to political subdivisions, that this Court has done so without explicitly holding that such applicability is proper. *See* Brief of Appellants at 23; 28-30.

In advancing this proposition, Appellants primarily rely on this Court's decision in *Kumler v. Silsbee*, 38 Ohio St. 445 (1882), as holding that only individuals may assert rights under the Retroactivity Clause. *See* Brief of Appellants at 23. However, Appellants'

interpretation of *Kumler* is flawed, evidenced by their attempt to contrast the "individuals" referred to therein with "subordinate agencies" of the State. To be clear, this Court, in *Kumler*, stated the following, from which Appellants have drawn this distinction:

> "But 'the constitutional inhibition [against retroactive laws] does not apply to legislation recognizing or affirming the binding obligation of the state, or any of its *subordinate agencies*, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting *individuals*, and *thus protect vested rights from invasion*.'"

Kumler, 38 Ohio St. at 447, quoting *New Orleans v. Clark*, 95 U.S. 644, 655 (1877) (emphases added). Thus, this passage is *not* an analysis of which parties may assert rights under the Retroactivity Clause, as Appellants claim; rather, it is a clarification of the *type* of rights protected by the clause.

Appellants continually employ this distinction, based on the quoted language above, throughout the portion of its brief on this issue. In citing other Ohio cases to develop their proposition, however, Appellants do not account for many distinguishing factors. For example, Appellants have quoted a passage with regard to this Court's decision in *State ex rel. Sweeney v. Donahue*, 12 Ohio St.2d 84, 87 (1967), which states, in Appellants' brief, only that "a statute which impairs only the rights of the state may constitutionally be given retroactive effect." But more meaning can be drawn from *Donahue* when the remainder of the passage, that "such effect will not be given in the absence of clear expression of legislative intention for retroactivity," is considered. *Id.* at 87. Rather than Appellants' intended meaning, this passage merely clarifies that statutes will not be given retroactive effect absent the intent by the General Assembly to do so. No mention is made as to the parties which have standing to assert rights under the Retroactivity Clause.

Appellants' reliance on *State ex rel. Bates v. Trs. of Richland Twp.*, 20 Ohio St. 362, syl. ¶¶ 3-4 (1870), is equally misplaced, for that case stands merely for the proposition that "in the class of laws now under consideration, [counties, townships and cities of the State] are employed by the legislature as mere instrumentalities *to raise a tax for a public object*," and that such laws are not to be regarded as retroactive. *Id.* (emphasis added). Again, no mention is made with regard to the standing of political subdivisions of the State under the Retroactivity Clause; the case merely characterizes a certain type of laws as not unconstitutionally retroactive. Reliance on *State ex rel. Dep't of Mental Hygiene & Corr., Bur. of Support v. Eichenberg*, 2 Ohio App.2d 274, 276 (9th Distr. 1965), and *State v. White*, 132 Ohio St.3d 344, 352 (2012), is similarly misplaced where, again, no distinction is made between individuals and political subdivisions with respect to rights under the Retroactivity Clause.

Admittedly, this Court has ruled that political subdivisions are not authorized to assert claims under other constitutional provisions. Appellants correctly note that, with regard to due process or equal protection claims, "a political subdivision…is not entitled to rely upon the protections of the Fourteenth Amendment." *See Avon Lake City Sch. Dist. v. Limbach*, 35 Ohio St.3d 118, 122 (1988). Appellants, based solely on their misinterpretation of the above cases, cite *Avon Lake* in the context of urging this Court to extend its holding to the Retroactivity Clause. In holding that political subdivisions may not avail themselves to constitutional equal protection provisions, *Avon Lake* appears to overturn a portion of this Court's decision in *Crotty* which struck down a statute on equal protection grounds because it discriminated against other political subdivisions. Appellants, in their brief, attempt to conflate constitutional equal protection provisions with the Retroactivity Clause and simply conclude that an extension of the *Avon Lake* decision to the Retroactivity Clause is proper. *See* Brief of Appellants at 34.

However, as this Court states in that case, a "search of Ohio cases has not located any other cases dealing with this question," whereas in the instant case, a bevy of cases are cited herein and in Appellants' brief dealing with the question of the applicability of the Retroactivity Clause to political subdivisions. Thus, where this Court may have lacked adequate precedent in *Avon Lake*, the same cannot be said of the instant case.

B. As A Matter Of Public Policy, Ohio Counties Must Be Able To Reasonably Rely On The Availability Of Funds Received From The State.

Similar to the arguments advanced by Appellees in the instant case, it is the view of CCAO that its member counties are entitled to the same certainty regarding the availability of funds to which it has accrued a substantive right under statutory law. To be certain, CCAO recognizes that part of the essence of the Ohio Revised Code is that it is "revised," and that the General Assembly should and does have the constitutional authority to pass legislation affecting the *future* distribution and allocation of such funds. However, Ohio counties receive significant amounts of funding from the State in order to carry out its policy objectives, and if the General Assembly is permitted to pass retroactive legislation affecting the distribution and allocation of such funds or the counties' right to them, the resulting uncertainty will have several unanticipated consequences.

In addition to addressing the applicability of the Retroactivity Clause to political subdivisions, this Court's decisions in *Rosche Bros.*, 50 Ohio St. 103; *Crotty*, 133 Ohio St. 532; and *Outcalt*, 134 Ohio St. 457, address the authority of Ohio counties to maintain on deposit funds paid or distributed to it, free from the threat of remittance or refund of such funds pursuant to retroactive legislation enacted by the General Assembly. It is CCAO's position that these cases, while lending support to Appellees' arguments, primarily concern the effect of certain retroactive laws as they apply to funds paid into county coffers. Thus, in light of the arguments

set forth in Part A hereof, CCAO urges protection of the holdings in these cases in order to limit retroactive manipulation of such funds by the General Assembly. As a matter of public policy, it is necessary, in order to avoid economic waste to the taxpayers of the State and CCAO's member counties, to uphold the reasonable reliance provided to Ohio counties by these cases that funds paid into county coffers will not be subject to remission or refund.

The reliance of Ohio counties on the certainty and availability of such funds is employed in several ways in the effective administration of such counties as delegates for the State's policy mandates. Counties rely on the State to fund, at least in part, the activities that have been delegated to them by the General Assembly, including, among others, the construction and maintenance of the State's infrastructure, the provision of job and family services and child protective functions, and the administration of justice and public safety. Further, contracts and other long-term obligations entered into by Ohio counties depend, in part, on funds from the State, including revenues distributed from the Local Government Fund. Any shortage of these funds subsequent to their appropriation by the General Assembly and their inclusion in county budgets would result in the inability by such counties to perform under those contracts or other obligations, which could lead to the payment of extraordinary fees necessary to terminate those contracts or obligations.

CCAO is also of the view that the General Assembly's preclusion of Appellees' causes of action, if sanctioned by this Court, will set a concerning precedent under which its member counties could never be confident in the certainty of its budgeting process, at least to the extent that budget expenditures depend on funding from the State. This precedent would thereby inhibit the ability of Ohio's counties to operate as an effective medium through which the State may accomplish its local policy goals. Like Appellees in this case, applying the logic utilized by

this Court in *State ex rel. Board of Education of Kenton City School District v. State Board of Education, et al.*, 174 Ohio St. 257 (1963), and because the General Assembly has statutorily delegated certain governmental functions, CCAO's member counties have a substantive right which accrues under Ohio statutory law to the funds received by them from the State to accomplish these functions. Thus, CCAO urges this court to affirm the Tenth District's decision and make it clear that the General Assembly may not pass retroactive legislation that would retroactively manipulate funding from the State or nullify the right of CCAO's member counties to such funds.

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IV. CONCLUSION

As both the trial court and the Tenth District have held below, the Retroactivity Clause bars the General Assembly from nullifying the accrued substantive rights of political subdivisions in Ohio. This Court's jurisprudence definitively recognizes the right of political subdivisions to assert claims under the Retroactivity Clause. Appellants' primary argument, that the Retroactivity Clause does not protect the substantive rights of political subdivisions, directly contradicts this Court's previous rulings on the issue. Further, as a matter of public policy, the carrying out of local governmental functions delegated to Ohio's counties by the General Assembly should be accompanied with the certainty that the State will provide adequate funds to accomplish those functions. CCAO urges this Court to affirm the decision of the Tenth District and, thereby, provide assurances to Ohio's counties that their rights may never be retroactively annulled by the General Assembly.

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CERTIFICATE OF SERVICE

The undersigned certifies that, in accordance with S.Ct.Prac.R. 3.11(B), a copy of the foregoing Merit Brief of *Amicus Curiae* the County Commissioners Association of Ohio was served via email on this 1st day of September, 2015, upon the following counsel:

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