
IN THE SUPREME COURT OF OHIO
CASE NO.: 2021-1004

Appeal from the Court of Appeals
Sixth Appellate District
Ottawa County, Ohio
Case No. OT-20-023

ESTATE OF JENNINGS FLEENOR

Appellee

v.

COUNTY OF OTTAWA d/b/a OTTAWA COUNTY RIVERVIEW NURSING HOME

Appellant

**BRIEF OF AMICUS CURIAE COUNTY COMMISSIONERS ASSOCIATION OF OHIO
IN SUPPORT OF COUNTY OF OTTAWA
D/B/A OTTAWA COUNTY RIVERVIEW NURSING HOME**

FRANK H. SCIALDONE (0075179)*
*COUNSEL OF RECORD
Mazanec, Raskin & Ryder Co., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
(440) 248-7906
(440) 248-8861 – Fax
Email: fscialdone@mrrlaw.com

Counsel for Amicus Curiae County
Commissioners Association of Ohio

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I. STATEMENT OF INTEREST OF AMICUS CURIAE AND INTRODUCTION

Amicus curiae County Commissioners Association of Ohio (CCAO) represents Ohio's 86 boards of county commissioners and the Summit and Cuyahoga County Executives and Councils. CCAO advances effective county government for Ohio through legislative advocacy, education and training, technical assistance and research, quality enterprise service programs, and greater citizen awareness and understanding of county government. CCAO joins as amicus in support of Appellant Ottawa County to promote clarity of Ohio law on the proper identification and naming of county boards of commissioners in civil lawsuits and in doing so to uphold the intent of the Legislature.

CCAO asks this Court to reverse the Sixth District Court of Appeals and to issue a clear pronouncement that expressly adopts the Defendant/Appellant Ottawa County's proposition of law: "Counties and their agencies and departments are not sui juris, and can only be sued through the county boards of commissioners." CCAO asserts the proposition is firmly in accord with the Legislature's express language and intent as well as prevailing precedent. R.C. 305.12; R.C. 301.22. The established general rule is that counties are not sui juris and cannot sue or be sued. No statute in the Ohio Revised Code authorizes a county to be sued or sue, unless it adopts a charter or alternative form of government. This law, properly applied, fosters clarity and predictability about how county boards of commissioners are sued, which is paramount to the interests of CCAO. This Court's application of the law here will eliminate uncertainty. It will also avoid future unnecessary, wasteful and expensive trial and appellate litigation over counties' legal capacity to be sued that is taxing on the CCAO's members and the courts.

Despite the intermediate appellate court's decision, courts and litigants generally recognize that the Legislature expressly authorized suits to be filed against boards of county commissioners and did not authorize counties to be sued. Counties are not sui juris. As set forth below, CCAO

respectfully asks this Court to reverse the intermediate appellate court and adopt Defendant/Appellant Ottawa County's proposition of law.

II. STATEMENT OF THE CASE AND FACTS

Amicus Curiae CCAO adopts and incorporates the Statement of the Case and Facts contained in the Defendant/Appellant Ottawa County's merits brief.

III. LAW AND ANALYSIS

A. Counties are not sui juris and cannot sue or be sued; they can only be sued through their county boards of commissioners.

Both plaintiffs and defendants in a lawsuit "must be legal entities with the capacity to be sued." *Patterson v. V & M Auto Body*, 63 Ohio St.3d 573, 574, 589 N.E.2d 1306 (1992)("If a defendant in a lawsuit is not an actual or legal entity, then any judgment rendered against that entity is void.").

Nowhere in Revised Code is there any statute authorizing a county to be sued or sue, unless it adopts a charter or alternative form of government. The general rule is that counties are not sui juris and cannot sue or be sued.

Ohio law is long established that counties may exercise only those powers affirmatively granted by the General Assembly. *State ex rel. Shriver v. Belmont Cty. Bd. of Commrs.*, 148 Ohio St. 277, 74 N.E.2d 248 (1947), paragraph two of the syllabus; *Portage Cty. Bd. of Commrs. v. Gates*, 83 Ohio St. 19, 30, 93 N.E. 255, 259 (1910); *Lake Cty. Commrs. v. Ashtabula Cty. Commrs.*, 24 Ohio St. 393, 401 (1873).

There is no dispute that the Legislature did not explicitly confer the ability of a county to sue or be sued. Ottawa County is a geographical area that is not sui juris. This Court has recognized that a county is organized for judicial and political purposes and is not regarded as a body corporate like a municipality. See *Schaffer v. Bd. of Trustees of Franklin Cty. Veterans Mem'l*, 171 Ohio St.

228, 230, 168 N.E.2d 547, 549 (1960)(“plaintiff fails to recognize that a county is a subdivision of the state, organized for judicial and political purposes. It is not a legal person or a separate political entity.”)¹

Under R.C. 305.12, the Legislature did expressly confer the ability for a board of county commissioners to sue and be sued.

The board of county commissioners may sue and be sued, and plead and be impleaded, in any court. ...

R.C. 305.12. This section expressly designates how to sue a non-chartered county – through the board of county commissioners. A non-chartered county may only be sued by naming the board of county commissioners.

Moreover, the Legislature was explicit that a county could not be sued unless it “adopt[s] a charter or alternative form of government....” R.C. § 301.22. The Legislature expressly provided:

Every county adopting a charter or an alternative form of government is a body politic and corporate for the purpose of enjoying and exercising the rights and privileges conveyed under it by the constitution and the laws of this state. Such county is capable of suing and being sued, pleading and being impleaded.

R.C. § 301.22. Therefore, a county is not sui juris unless the terms of § 301.22 are met. There is no dispute that in the present case that Ottawa County has not adopted a charter or an alternative form of government. It cannot sue or be sued.

No reasonable interpretation of R.C. 301.22 can result in the conclusion that the Legislature has authorized a non-charter county to be sued, let alone that the Legislature has affirmatively and

¹ Unlike a municipality, a county is not a body corporate and therefore is not a separate legal person or entity. Rather, it is a constituent part of the plan of permanent organization of the state government and is a wholly subordinate political division or instrumentality of the state. A county is a mere political organization of certain territory within the state, particularly defined by geographical limits. *See generally* 20 Ohio Jur. 3d Counties, Etc. § 2910

explicitly authorized that result. Such interpretation is contrary to well established Ohio law that expressly prohibits this type of argument. *Akron v. Rowland*, 67 Ohio St.3d 374, 380, 618 N.E.2d 138 (1993) (courts must not “under the guise of construction, [] ignore the plain terms of a statute or to insert a provision not incorporated by the legislature.”). Neither the Plaintiff nor the intermediate appellate court offered a legitimate statutory source for its position that the county is sui juris.

The Ohio legislature is adept at crafting statutory authorization to sue when it intends to do so. See, supra, R.C. 145.09 (the public employees retirement board); R.C. 3307.03 (state teachers retirement board); R.C. 3313.17 (boards of education); R.C. 4901.02 (public utilities commission of Ohio); R.C. 4582.02 (port authorities). For further example, the Legislature in authorizing municipalities to sue and be sued was unequivocal. Under Ohio Revised Code § 715.01, “[e]ach municipal corporation is a body politic and corporate, which ... may sue and be sued....” O.R.C. § 715.01. Contrasting that to the Legislature’s treatment of counties, there is no statutory authority affording a non-chartered county the capacity to be sued. While Plaintiffs undoubtedly will disagree with the wisdom of Ohio’s legislative choices, this Court has made clear that the “wisdom of legislation is beyond the purview of the courts.” *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 455, 715 N.E.2d 1062 (1999). This Court has also recognized “‘The primary duty of a court in construing a statute is to give effect to the intention of the Legislature enacting it.’ ” *Brown v. Martinelli* 66 Ohio St.2d 45, 49, 419 N.E.2d 1081, 1083 (1981). If it intended to subject counties to suit, the General Assembly would have expressed that intent clearly. The express words of the statute are the best indicator of the Legislature’s intent and there can be no dispute that non-charted counties like Ottawa County are not sui juris.

This Court has held that entities, like counties, cannot sue or be sued, absent statutory authority. See *Hunter v. Com'rs. of Mercer Cty.*, 10 Ohio St. 515 (1860) (“But a county can neither sue nor be sued, except by express power conferred by statute, and in the manner so expressed.”); *City of Cuyahoga Falls v. Robart*, 58 Ohio St. 3d 1, 6, 567 N.E.2d 987, 992 (1991) (“A city council is not sui juris and therefore cannot sue or be sued in its own right, absent statutory authority.”); see also *State, ex rel. Cleveland Municipal Court, v. Cleveland City Council*, 34 Ohio St.2d 120, 122, 296 N.E.2d 544, 547 (1973)(same); *Council of Whitehall v. Rogers*, 69 Ohio App.2d 124, 432 N.E.2d 216 (10th Dist. 1980)(same). Courts applying Ohio law generally hold that counties, as political entities, are not sui juris; they are held accountable through their elected representatives, to wit, their commissioners. See e.g.s *McGuire v. Ameritech Servs., Inc.*, 253 F. Supp. 2d 988, 1015 (S.D. Ohio 2003); *Yunger v. Hamilton Cty.*, Ohio, No. 1:12-CV-00251, 2012 WL 6725590, at *1 (S.D. Ohio Dec. 27, 2012) (the County itself is not a legal entity capable of being sued, it is not sui juris); *Clellan v. Wildermuth*, 10th Dist. Franklin No. 11AP-452 2011-Ohio-6390, ¶ 19 (In general, counties can neither sue nor be sued.).

The Sixth District’s opinion is incorrect and does not address these statutory mandates and prevailing precedent.

B. Despite the lower court’s position, the Ohio Immunity Act (R.C. Chapter 2744) creates an affirmative defense that provides immunity; it does not confer on a non-chartered county the ability to sue or be sued.

The Sixth District erroneously concluded that a county’s “suability is not conceptually distinct from the county’s sovereign immunity as a political subdivision of the state” and therefore a county is sui juris. (*Est. of Fleenor v. Cty. of Ottawa*, 2021-Ohio-2251, ¶ 72, citing *Plate v. Johnson*, 149 F.Supp.3d 827 (N.D. Ohio 2016)). This was based on a fundamentally incorrect conception of the Immunity Act (R.C. Chapter 2744) and the unexplained dicta of a federal district court case.

The Sixth District’s opinion is fundamentally unsound because it confuses the exceptions to a political subdivision’s presumptive immunity under R.C. 2744.02(B) as authorizing a lawsuit against a county on the merits. *Id.* at ¶ 71(citing two exceptions to immunity under R.C. 2744.02(A): R.C. 2744.02(B)(2) and (5).) The exceptions under R.C. 2744.02(B)(1-5) are irrelevant to the issue before the Court and are narrow exceptions to a political subdivision’s presumptive immunity. There is no language in Chapter 2744 that authorizes suits against counties. Moreover, the Immunity Act was designed to provide protections to political subdivisions and their employees, not to confer the ability of a county to sue or be sued. Neither the text nor the policy behind the Immunity Act support the Sixth District’s unsupported claim that the Act makes a county *sui juris*. The inclusion of counties within the definition of a “political subdivision” is insufficient to subject a county to suit. Rather, the Act merely provides additional protections to political subdivisions.

Immunity under the Tort Immunity Act (Chapter 2744 of the Revised Code) is an affirmative defense, separate from the merits of a claim or the capacity to be sued. Ohio courts uniformly agree that R.C. Chapter 2744 immunity is an affirmative defense. See, e.g., *Supportive Sols., L.L.C. v. Elec. Classroom of Tomorrow*, 137 Ohio St. 3d 23, 25, 2013-Ohio-2410, ¶ 17, 997 N.E.2d 490, 492 (immunity under R.C. Chapter 2744 is an affirmative defense). The Sixth District here erroneously uses an immunity that the Legislature expressly enacted to broadly protect political subdivisions to create a new capacity to sue or be sued in absence of Legislative language or intent.

The Immunity Act does not support the Sixth District’s erroneous opinion. The Tort Immunity Act provides broad immunity to political subdivisions and their employees. The Legislature enacted the Act because “the protections afforded to political subdivisions and

employees of political subdivisions by this act are urgently needed in order to ensure the continued orderly operation of local governments and the continued ability of local governments to provide public peace, health, and safety services for their residents.” *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522 at ¶ 38, citing Am.Sub.H.B. No. 176, Section 8, 141 Ohio Laws, Part I, 1733. The “ ‘manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.’ ” *Id.*, citing *Wilson v. Stark Cty. Dept. of Human Servs.*, 70 Ohio St.3d 450, 453, 639 N.E.2d 105 (1994). Creating potential additional liability is contrary to the text and intent of the Act.

The Sixth District’s reliance on the Tort Immunity Act to create suability is antithetical the very purpose and rationale for the Act. A critical aspect of immunity is that it is immunity from suit, not merely liability. *Summerville v. Forest Park*, 128 Ohio St.3d 221, 230, 2010-Ohio-6280, ¶ 39, 943 N.E.2d 522, 531(“ ‘As the General Assembly envisioned, the determination of immunity could be made prior to investing the time, effort, and expense of the courts, attorneys, parties, and witnesses’ ”). The absence of any statutory authority authorizing a county to sue or be sued and the clear instructions from the Legislature about suing boards of county commissioners (and the stark inapplicability of the Immunity Act) firmly support the adoption of the proposition of law that counties are not sui juris and must be sued through their county boards of commissioners.

IV. CONCLUSION

This Court should reverse the intermediate appellate court and adopt Defendant/Appellant Ottawa County’s Proposition of Law.

Respectfully submitted,

MAZANEC, RASKIN & RYDER CO., L.P.A.

/s/Frank H. Scialdone

FRANK H. SCIALDONE (0075179)

100 Franklin’s Row

34305 Solon Road
Cleveland, OH 44139
(440) 248-7906
(440) 248-8861 – Fax
Email: fscialdone@mrrlaw.com

Counsel for Amicus Curiae County Commissioners
Association of Ohio

CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Amicus Curiae County Commissioners Association of Ohio has been electronically filed and served via email and by regular U.S. mail, postage prepaid, on January 3, 2022 to the following:

William B. Eadie, Esq.
Michael A. Hill, Esq.
Eadie Hill Trial Lawyers
3100 E. 45th Street, Suite 400
Cleveland, OH 44127
william.eadie@eadiehill.com
michael.hill@eadiehill.com

Teresa L. Grigsby, Esq.
Jennifer A. McHugh, Esq.
Spengler Nathanson P.L.L.
900 Adams Street
Toledo, OH 43604
tgrigsby@snlaw.com
jmchugh@snlaw.com

Counsel for Plaintiff/Appellee Estate of Jennings Fleenor of Counsel for Defendant/Appellant County of Ottawa, d/b/a Ottawa County Riverview Nursing Home

/s/Frank H. Scialdone

FRANK H. SCIALDONE (0075179)

Counsel for Amicus Curiae County Commissioners
Association of Ohio