

CRIMINAL

IN THE SUPRME COURT OF OHIO

CITY OF INDEPENDENCE)	
Plaintiff-Appellee,)	Supreme Court Case No.
)	13-0984
v.)	
)	On Appeal from the Cuyahoga County
CUYAHOGA COUNTY BOARD OF)	Court of Appeals
COUNTY COMMISSIONERS, et al.,)	Eighth Appellate District
)	Case No. 97167
Defendant-Appellants)	
)	

**MEMORANDUM IN SUPPORT OF JURISDICTION BY AMICUS CURIAE
COUNTY ENGINEERS ASSOCIATION OF OHIO**

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FILED
 JUN 17 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

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STATEMENT OF INTEREST OF AMICUS CURIAE

The County Engineers Association of Ohio (“CEAO”) is a private, not-for-profit statewide association of county engineers of 87 of Ohio’s 88 counties and the appointed county engineer of Cuyahoga County.

CEAO’s members are responsible for the provision of safe roads, bridges and culverts on county roads and safe bridges on township roads and in some instances on certain bridges on improved roads, the later being the question in this case.

CEAO provides information and education to its members, their staffs and others in order to enhance the ability of the members to better carry out their duties and works with the public sector, legislators, and state, county, municipal, township and other public officials to create an environment in which their members can best assist the public.

Sometimes when issues affect their members’ ability to best serve the public, CEAO will file an amicus curiae statement or provide briefing on relevant legal issues as is so in this case.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amicus Curiae County Engineers Association of Ohio adopts the Statements of Case and Facts set forth in the Defendants-Appellants’ Memorandum in Support of Jurisdiction.

THIS CASE IS OF PUBLIC ANG GREAT GENERAL INTEREST

This case presents three novel cases of first impression that are of public and great public interest. The first issue involves whether or not a vacated road can be the basis for requiring a county to keep in repair and construct a bridge on a road vacated more than thirty years ago. The second issue is whether a court can impose a requirement to keep in repair and construct a bridge based on the use of the bridge without considering the use of the road on which the bridge is located contrary to the applicable statutes requiring consideration of the road usage. Third

whether a court can require a county to keep in repair and construct a bridge that is split between two municipal boundaries.

The condition of roads and bridges and who has the responsibility to fix bridges and pay the cost to fix the bridges, and whose bridge gets fixed and when it is fixed is a matter of great and general interest to every Ohio citizen.

The pool of funds for use to construct bridges is not infinite and there is a big backlog of bridge projects that need to be done and await funding. If one community can demand funding of their bridge repair, other communities are put back further on the list of needed projects. The American Society of Civil Engineer's 2013 Report Card on the Nation's Infrastructure found that 2,462 of the 27,045 bridges in Ohio (9.1%) are considered structurally deficient and another 4,311 of its total bridges in Ohio (an additional 15.9%) are considered functionally obsolete and need replacement. (Report Card at <http://www.infrastructurereportcard.org/ohio/ohio-overview/>).

The public concern includes the traveling public who require safe bridges, tax payers who must pay for the bridges, and both county commissioners and county engineers who must make decisions about which bridges to build and when.

For these reasons, the issues in this case are of public and great general interest and the Court is urged to accept this case for review.

ARGUMENT IN SUPPORT OF APPELLANT'S PROPOSITION OF LAW

Appellant's Proposition of Law No. I:

Before a county may be held responsible for repair and maintenance of a bridge located on the boundary line between two cities, it must be determined whether the bridge is part of a road of general and public utility. Since a private drive is not a public road, it cannot be road of general and public utility. Because the bridge located upon that road is not part of a public road, the county has no responsibility to maintain or repair the such a bridge.

Old Rockside Road was vacated in 1967 and the Court of Appeals correctly so found.

See Opinion, *City of Independence v. Office of Cuyahoga County Executive*, 2013-Ohio-1336, 8th District Court of Appeals No. 97167, Court of Appeals of Ohio, Eighth District (April 4, 2013), ¶7. Cuyahoga County vacated the road in accordance with the provisions of R.C. Chapter 5553. No issue was raised in this case about the validity of the vacation.

A vacated road does not comply with the requirements in R.C. 55591.02 and 55591.21 which apply the mandates of the sections only to necessary bridges in municipal corporations over county roads and improved roads that are of general and public utility, running into or through a municipal corporation.

R. C. 5553.10 provides: "If the proceeding is for the vacation of a road, the board shall order the road vacated and it shall cease to be a public road."

Because the road is no longer a public road, it does not meet the requirement that the road be "of general and public utility" since the public has no right to utilize the road following its vacation.

R.C 5591.02 and R.C. 5591.21 contain no authority for establishing a public road and cannot be used as a backdoor method for reestablishing Old Rockside Road as a public road.

Because the Court of Appeals has based its decision on the application of R.C. 55591.02 and 55591.21, the Court's decision must be reversed.

Although the Court of Appeals recognized the “road” had been vacated and as indicated above, the vacation of the road is reason enough to reverse the Court’s decision, the Court also found that the “bridge” itself had not been vacated. Appellate Opinion, ¶7.

This finding is in error and if this Court finds that vacation of the bridge by itself is key, it should be noted that the Court of Appeals finding the bridge was not vacated, is in error.

Throughout the Revised Code, the term “road” is sometimes used as including a bridge as part of the road and sometimes the word “road” is used to mean a road excluding bridges. Generally when the term “road” is used by itself and not with the term “bridges” and the context requires the inclusion of the bridge, “road” is interpreted to include any bridge on the road. But when the term is used in series with the term “bridge”, the term road does not include a bridge on the road.

In the instant case, the vacation statutes, R.C. Chapter 5553, only deals with the vacation of a road or part of a road and the term “bridge” is not used. It is obvious in this instance that the proper interpretation would include any bridge that is part of the road being vacated.

Additionally, no public interest would be served by holding the county responsible for a bridge on a road that has been vacated in which the county would have no right to enter the right of way to maintain, construct, repair or operate the bridge. For this reason, an interpretation that excludes the Old Rockside Road Bridge on the road from the vacation defies logic.

Appellant’s Proposition of Law No. II:

A county has no duty to repair or replace a bridge on dead-end private drive serving a limited number of businesses. The county’s duty to repair or replace such a bridge depends upon whether the road served by the bridge is a road of general and public utility, and such a road primarily serves a small number of special and privates interests. *Interurban Ry. & Terminal Co. v. City of Cincinnati*, 94 Ohio St. 269 (1916); 1990 Ohio Op. Atty. Gen. 2-334, followed.

The Court of Appeals errs in finding that R.C. 5591.02 and R.C. 5591.21 will fix liability for repair and construction of the bridge on the grounds that the Old Rockside Road Bridge (not Old Rockside Road) is a bridge of general and public utility. See Court's determinations and affirmances of the Trial Court decision at *Appellate Opinion* ¶¶1, 14, 30, 37. Trial Court Judgment in *Appellate Opinion* at ¶5.

In making such a finding, the Court of Appeals is engaged in rewriting the statutory language and only the legislature can rewrite statutes. The Court's decision based only upon usage of the bridge, instead of the usage of the road that includes the bridge, must be reversed as non-compliant with the two applicable statutes, R.C. 5591.02 and R.C. 5591.21.

R.C. 5591.02 reads:

The board of county commissioners shall construct and keep in repair all necessary bridges in municipal corporations on all county roads and improved roads that are of general and public utility, running into or through the municipal corporations, and that are not on state highways.

The plain meaning of this statute is that the road, not the bridge, must be of general and public utility and to find otherwise as the Court of Appeals did, requires reversal.

The first paragraph and applicable part of R.C. 5591.21 reads:

Except as provided in section 5501.49 of the Revised Code, the board of county commissioners shall construct and keep in repair necessary bridges over streams and public canals on or connecting state, county, and improved roads.

As stated by the Court of Appeals in its analysis of this statute at *Appellate Opinion* ¶28, the case of *Washington Court House v. Dumford* 75, 258 NE.2d 261 (12th Dist, 1969) requires that R.C. 5591.02 and R.C. 5591.21 be read in *pari materia* so that R.C. 5591.21 is qualified and limited by the words "which are of general and public utility running into or through the municipal corporation". When read in *pari materia*, the Appellate Courts interpretation of this

statute, R.C. 5591.21 suffers from the same plain meaning problem as described above regarding R.C. 5591.02 and the Court's interpretation to the contra, must be reversed.

It also should be noted that the Court of Appeals throughout its Opinion contrary to the record that the County Prosecutor's office, and County Engineer argued that the bridge was not a bridge of general and public utility. Appellate Opinion ¶¶3, 9, 10, 21. The record both the oral recording of the hearing and the various documents in the record clearly show that the county was focused on the use of the road. They are in the record as claiming "it was a dead end road" and the "traffic count on the road did not justify finding the road was of general and public utility". Appellate Opinion ¶21.

The Court further states contrary to the record that the Board of Commissioners found the bridge to be a bridge of general and public utility. Appellate Opinion ¶¶1, 3, 10, 25. The record is clear that the Board focused on the fact that the road was not a road of general and public utility and made no findings relative to a bridge being of general and public utility. The Council at the beginning of the hearing, stated that the Board had received a request from the County Prosecutor for a determination of whether or not Old Rockside Road, located in the City of Independence and Village of Valley View, is a road of general and public utility, as that term is used in Ohio Revised Code Sections 5591.02 and 5591.21. The Board considered this item and made the determination that Old Rockside Road is not a road of general and public utility. The determination was adopted by majority vote, with Commissioner Dimora recusing himself from the vote. Clearly no determination was made by the Board with respect to the bridge being a bridge of general and public utility and it is inaccurate for the Court of Appeals to so report.

The mistaken finding by the Court relative to the positions of the County Prosecuting Attorney and the County Engineer and the actions taken by the Board of Commissioners, results

in the affirmance of the trial court's decision as not being supported by a preponderance of reliable, probative, and substantial evidence is in error and must be revised on this ground as well as the grounds resulting by the Court's rewrite of R.C. 55591.02 and R.C. 5591.21.

Proposition of Law No. III:

Under R.C. 5535.10, the responsibility for the maintenance of a bridge structure located on a vacated road does not shift to a county merely because that structure straddles a municipal boundary line.

The assertion by the trial court and affirmed by the Court of Appeals that a bridge that begins in one municipality and extends to a second municipality on a bridge divided by a common boundary is not within a municipality is reversible error. Trial Court Entry, Appellate Opinion ¶5, Court of Appeals Affirmance, Appellate Opinion ¶¶31, 37. Clearly the facts of record show that a portion of the bridge is in the City of Independence and part of the Bridge is in the Village of Valley View. None of the three cited statutes require the entire bridge to be wholly within a municipality. Part suffices.

And to the degree that the Court of Appeals relies on R.C. 723.01 that describes a municipality's responsibility for its streets including bridges within the municipality, it should be noted that the Board of Commissioners has no authority to determine what is a municipal bridge for which a municipality is responsible, rather its authority is only to determine if necessary bridges are on roads of general and public utility on or running through a municipality. To find the Board of Commissioners has such authority is reversible error.

CONCLUSION

For all the reasons set forth in this Memorandum, Amicus Curiae County Engineers Association of Ohio urges the Court to accept jurisdiction as a case of public and great general interest and review the propositions of law in Appellant's Propositions of Law I, II, and III.

Respectfully Submitted,



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County Engineers Association of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Amicus Curiae County Engineers Association of Ohio was served by U.S. mail this 17th day of June, 2013, and by e-mail upon the following counsel:

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