

RESPONSE TO ATTORNEY GENERAL'S DISMISSAL

Merrill v. Ohio, Eleventh District Court of Appeals, 2009-Ohio-4256 August 21, 2009

Activist Court Holds that Ohio Attorney General Has No Standing to Participate in Appeal

APPEALS COURT FINDING: The Eleventh District Court of Appeals found that “[t]he Ohio Attorney General may only act at the behest of the governor, or the General Assembly.”¹ In the *Merrill* appeal, the Attorney General was acting on behalf of the public, not the governor or General Assembly. Therefore, the court held that the Ohio Attorney General had no right to participate in the appeal and ordered the Attorney General’s “assignments of error and briefs stricken.”²

OEC ENVIRONMENTAL LAW CENTER PERSPECTIVE: This unprecedented finding could have unknown implications for the enforcement of any natural resource protection law or virtually any public protection law, including laws protecting human health, public safety and consumers. The court’s decision on this point is a misinterpretation of the Revised Code and a stark departure from over 100 years of court precedent.

The Appeals Court justified its removal of the Attorney General by citing **only** Ohio Revised Code Sec. 109.02.³ While this code section states that the Attorney General shall represent the state “[w]hen required by the governor or the general assembly,” the code does **not** state that the Attorney General cannot act on behalf of the public, as the Appeals Court decision implies.

In fact, as dissenting Judge Timothy Cannon writes, the language of the Revised Code is “language of inclusion, not of exclusion”⁴ and the court’s reading of that section is misguided:

“There is nothing [in the code] that prohibits the attorney general from appearing and representing the state when suit has been filed against it. I would not suggest the attorney general needs an order from the governor or legislation from the General Assembly to defend that state in litigation without first giving the attorney general the full opportunity to brief the issue. It is, quite simply, ground that does not need to be plowed in this case...[I]t is clear the citizens of the state of Ohio have an interest in the public trust portion of the waters of Lake Erie. Consequently, they are entitled to representation.”⁵

The court’s ruling limiting the authority of the Attorney General also conflicts with a long line of Ohio case law. The Ohio Attorney General has long had broad common law powers to act for the public’s benefit, with or without the direction of the Governor or General Assembly. The office of the Attorney General was created by Article III, Section 1 of the Ohio Constitution, a

¹ Opinion at page 11.

² Opinion at page 12.

³ Opinion at 11.

⁴ Opinion at 32.

⁵ Opinion at page 33.

section that was “adopted with a recognition of established contemporaneous common law principles, and...did not repudiate but cherished the established common law.”⁶

The Attorney General’s broad, independent powers to act on behalf of the citizens of Ohio have been recognized by the Supreme Court of Ohio, Ohio Appellate Courts, and federal district courts for more than 100 years:

“The Ohio Supreme Court has long recognized the broad inherent common law powers of the attorney general in serving in his dual role with regard to civil litigation: championing the proprietary and pecuniary interests of the government itself, and contesting infringements of the rights of the general public.”⁷

“[W]ithin the common law powers of the Ohio Attorney General is the power to bring, on his own initiative, civil actions on behalf of the state.”⁸

“That the attorney-general was authorized to institute such suits in behalf of the public is abundantly shown by the authorities.”⁹

Finally, the Eleventh District’s ruling directly conflicts with Ohio case law on the Attorney General’s authority to represent the state with regard to public trust issues. When directly confronted with this question, the First District Court of Appeals found that the Attorney General is the proper party to represent the rights of citizens:

“[The Attorney General of Ohio is the constitutional legal officer for the state, and the officer generally relied upon to institute any necessary legal action to protect the property rights of the state, and the rights of its citizens pertaining to the use and enjoyment of such property.”¹⁰

“It is quite natural, pursuant to the general constitutional and statutory powers of the Attorney General of the state, that his office is the one which should exercise the rights of the state of Ohio as they relate to the natural resources of the state, and the rights of the citizens of this state to the continued free use of such resources as are held in trust by our state.”¹¹

What is equally troubling is that the 11th District Appeals Court reached this decision through pure judicial activism—by unilaterally deciding that the *meaning* of the Revised Code 109.02 is somehow different from the *text* of that section. The court has attempted to constrain the role of the Ohio Attorney General—an independently elected official—by fiat.

⁶ *Ohio v. United Transp., Inc.*, 506 F. Supp. 1278, 1281 (S.D. Ohio 1981).

⁷ *Ohio v. United Transp., Inc.*, 506 F. Supp. 1278, 1281 (S.D. Ohio 1981).

⁸ *Ohio v. United Transp., Inc.*, 506 F. Supp. 1278, 1281 (S.D. Ohio 1981).

⁹ *State v. Railroad Co.*, 36 Ohio St. 434, 440 (Ohio 1881).

¹⁰ *State ex rel. Brown v. Newport Concrete Co.*, 44 Ohio App. 2d 121, 129 (Ohio Ct. App., Hamilton County 1975).

¹¹ *State ex rel. Brown v. Newport Concrete Co.*, 44 Ohio App. 2d 121, 129 (Ohio Ct. App., Hamilton County 1975).

Further, in addressing the role of the Attorney General in its decision, the court took the unusual step of ruling on an issue that was not raised by either party. Referred to as a “*sua sponte*” decision, the act of ruling on an issue not raised by the parties at trial is generally frowned upon by courts.

The Ohio Supreme Court has held that *sua sponte* actions by courts are inappropriate in most circumstances unless the “parties are given notice of the courts [sic] intention...and an opportunity to respond.”¹² In this case, the Court of Appeals summarily dismissed the Attorney General from the case without allowing either party to submit briefs to discuss the issue. As 11th District Ohio Appeals Judge Cannon notes in dissent, the Attorney General should not have been dismissed “without first [having been given] the full opportunity to brief the issue.”¹³

Justice Antonin Scalia of the United States Supreme Court has stated that *sua sponte* decision-making by appellate courts conflicts with the fundamental tenets of our legal system:

*“The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.”*¹⁴

In its decision in *Merrill*, the Eleventh District Court of Appeals is at once attempting to add words to the Revised Code, to overrule over 100 years of Ohio court precedent, and to deprive citizens the protection of an independent Attorney General as provided for by Article III of the Ohio Constitution.

¹² *Ex rel. Fogle v. Steiner*, 74 Ohio St. 3d 158 (1995).

¹³ Opinion at 33.

¹⁴ *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).