

FILED

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE

SUPERIOR COURT DIVISION

02 CVS _____

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WAKE COUNTY, C.S.C.

W. D. GOLDSTON, JR., JAMES E.)
HARRINGTON, and citizens, taxpayers)
and bondholders similarly situated,)
Plaintiffs,)

vs.)

COMPLAINT FOR
DECLARATORY JUDGMENT
AND INJUNCTIONS

STATE OF NORTH CAROLINA and MICHAEL F.)
EASLEY, Governor, individually and in)
his official capacity,)
Defendants.)

Plaintiffs, complaining of Defendants, alleges and says:

1. Plaintiff W. D. Goldston, Jr. is a citizen, taxpayer and resident of Rockingham County, North Carolina. He has resided in this State and the United States for more than thirty years, and at all times mentioned herein, paid state and federal taxes on motor fuel and other highway related taxes to the governments.

Goldston was a Senator in the N.C. General Assembly from the 24th Senate District from 1985-1992. He was Chairman of the Senate Transportation Committee and co-Chair of the State Highway Study Commission in the late 1980's that reviewed the State's highway system and need to connect all 100 county seats. More than twenty public hearings were held in New Bern, Raleigh, Lenoir, Charlotte and other places throughout North Carolina. The Committee formulated a feasible plan for North Carolina "Intrastate Highways," "Urban Loops," "City Streets," and "Secondary Roads." One result was creation in 1989 of the "N.C. Highway Trust Fund" for the purpose of improving 1,844.2 miles of specific "transportation corridors" and completing 205.4 miles of urban loops around seven named cities.

Since 1989, Goldston and other citizens similarly situated paid and are paying motor fuel and other highway taxes which by law are collected expressly for application to purposes set forth in the 1989 Highway Trust Fund Act.

3. Plaintiff James E. Harrington is a citizen and taxpayer residing in Brunswick County, North Carolina. He is a taxpayer and citizen of the State and the United States for more than thirty years. At all times mentioned herein, he paid state and federal taxes to the governments on purchases of motor fuel and other highway related taxes.

Plaintiff Harrington served the State as Secretary of the North Carolina Department of Natural and Economic Resources (1973-1976) and as Secretary of the Department of Transportation (1985-1989). He initiated the State Highway Study Commission and provided information and advice regarding legislative studies and public hearings relating to the Highway

Trust Fund including planning, construction and financing of the intrastate highway system, urban loops, city streets and secondary roads in the late 1980's and early 1990's.

In about 1987-1989, he participated in creation of the "N.C. Highway Trust Fund" as hereinafter described. After 1989 he served as appointee by the General Assembly to the Government Performance Audit Committee (GPAC) and to various interim legislative commissions dealing with budget and highway funding issues.

Since 1989, Harrington and other citizens similarly situated paid and are paying motor fuel and other highway taxes which by law are expressly collected to be applied to the purposes set forth in the 1989 statutes.

4. Thousands of citizens similarly situated to the named plaintiff, Harrington, are owners of State government bonds issued pursuant to the "State Highway Bond Act of 1996." Bond owners have a material interest in the subject matter of this lawsuit. Payment of bond principal and interest from the Highway Trust Fund pursuant to law is critical to the State's bond rating in which all citizens and residents have an interest.

5. Plaintiffs' "standing" to seek relief here is both direct, derivative and of necessity.

a. Direct. These Plaintiff taxpayers have individual standing and right to sue since a tax has been levied for an unconstitutional purpose, the challenged tax law will cause him or her to sustain personally a direct and irreparable injury, or the taxpayer is a member of a class of plaintiffs prejudiced by the operation of a law or Executive Order having the force and effect of law.

b. Derivative. These Plaintiff taxpayers have standing to bring a "taxpayer action" on behalf of a public agency or political subdivision because the proper authorities wrongfully failed, neglected or refused to act and a demand on such authorities to act was rendered useless.

c. Necessary. These Plaintiff taxpayers' action was of necessity because the Courts do not initiate proceedings to test government actions that might be unconstitutional. State officials will not seek judicial advisory opinions about legality of their actions. The People are sovereign and have granted limited authority to government officials to serve according to the Constitution for the good of all people. Any citizen has a right to judicially challenge what he or she believes is a violation of the Constitution.

6. Since at least 1989, Plaintiffs and hundreds of thousands of others similarly situated, are and for many years have been obligated by law to pay motor fuels taxes, alternative fuels taxes, highway use taxes,

fuel and oil inspection taxes, driver license fees, auto title certificate fees, vehicle registration fees, lease and lien recording fees, and others related taxes and fees. These tax proceeds by law must be deposited to the account of the Highway Trust Fund. (G.S. §105-445, G.S. §105-449.16, G.S. §105-449.43, G.S. §105-171 and G.S. §20-85, and others.)

7. Defendants include the State of North Carolina and the Governor, individually and in his official capacity, who has misapplied public funds in violation of the laws and Constitution and has allowed public funds to be withdrawn and misapplied without legislative authority in violation of the laws and Constitution.

8. Objections to defendants' actions have been made and requests that corrective action be taken have been wrongfully ignored by defendants and other state officials. No officer or agent of the State has made any positive response to the objections and requests. Further informal action to obtain proper compliance with the law and Constitution is futile.

9. A majority of the People, including Plaintiffs, enacted by majority vote the State's third Constitution, the 1970 Constitution of North Carolina. It provides in Art. V:

Sec. 5. Acts levying taxes to state objects.
Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose.

10. The tax laws and Highway Trust Fund Act "state the special object[s]" to which peoples money is "to be applied." Special objects are multi-year funding of the Highway Trust Fund consisting of state tax revenue and federal grant moneys and the investment earnings thereon that must be applied exclusively for "special objects" of intrastate highways, urban loops, city streets, and secondary roads as specified by the tax laws. The public's money is to be applied "to no other purpose."

The "special objects" prescribed by the statutes include:

- a. Intrastate Highway System. G.S. §136-179,
- b. Urban loops. G.S. §136-180,
- c. City streets. G.S. §136-181,
- d. Secondary roads. G.S. §136-182,
- e. Debt service on highway bonds. G.S. §136-176(b), and
- f. DOT administration expenses. G.S. §136-176(b).

"Special objects" to which highway trust fund taxes must be applied include highway and urban loop planning, construction, and maintenance

projects, payment of principal and interest on bonds issued under the State Highway Bond Act of 1996, and DOT administration expense.

11. Highway Trust Fund taxes since 1989 are designated "Special Revenue Funds" by State Treasurer Richard Moore's predecessor, Treasurer Harlon Boyles, pursuant to governmental Generally Accepted Accounting Principles (GAAP). Special revenue, such as Highway Trust Funds are "funds maintained to account for those financial resources which are restricted by legal, regulatory or administrative action to finance particular functions or activities of the State." These special revenue funds of the Highway Trust Fund are designated "multi-year expenditures." They are separately received, separately deposited and separately accounted for. Trust Funds are not part of the "expenditures" of the State's biennial budget.

12. Pursuant to the Constitution, state biennial budgets must be recommended initially by the Governor. The actual biennial budget is then debated and subsequently enacted by the Legislature. Thereafter, the budget consisting of "revenue" and appropriated "expenditures" is administered by the Executive Branch. The Governor by law is *ex officio* Executive Director of the Budget. Highway Trust Fund taxes are not General Fund revenue and thus not part of "revenue" or "expenditures" of the State biennial budget.

13. On February 5, 2002, by arbitrary action styled "Executive Order No. 19, "\$80,000,000 in Trust money was taken from the Highway Trust Fund Account in the State Treasury. The Trust funds removed were credited to the General Fund of the State Treasury.

14. Thereafter, upon information and belief, the defendant Treasurer allowed Trust Funds to be withdrawn and disbursed on various programs, consulting fees, salaries, and operating costs wholly unrelated to the "special object" and "purpose" of highway safety, transportation, repair, construction and other highway trust fund objects and purposes.

15. The purported legal and constitutional authority given by the defendant Governor and apparently agreed to by the Treasurer is Art. III, Sec. 5(3). In pertinent part the Constitution states:

Sec. 5. Duties of Governor.

3. Budget. The Governor shall prepare and recommend ... a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period.

A budget for the "ensuing fiscal period" is then enacted by the General Assembly. The Constitution continues:

The budget as enacted by the General Assembly shall be administered by the Governor.

The Constitution requires the State's budget to be balanced; that is,

The total expenditures ... for the fiscal period covered by the budget shall not exceed the total of receipts during that fiscal period ...

To protect against a fiscal emergency, that is, to insure that the State does not incur a deficit "for any fiscal period," the Constitution grants the following limited authority:

[W]henever he [sic] determines that receipts during the fiscal period ... will not be sufficient to meet budgeted expenditures ...

[T]he Governor shall ... effect the necessary economies in State expenditures.

Even assuming the State's fiscal deficiency that exacerbated continually over a three year period suddenly became an "emergency," the Governor is restricted to economizing only in the current budget's "expenditures."

16. The Constitution commands in Sec. 4. Execution of laws:

The Governor shall take care that the laws be faithfully executed.

17. Defendants failed to obey the Constitution. Defendants failed to make appropriate changes in State expenditures, that is the defendant Governor aided and abetted by other Government officials failed to "effect the necessary economies in expenditures," for the fiscal period covered by the budget, the biennium budget years 2001-02, 2002-03. Defendant State failed to obey its duty to adjust expenditures of the state budget enacted September 26, 2001¹ to "meet budgeted expenditures" of the first year of the 2001-03 biennial budget.

18. The Defendant State of North Carolina, acting through the General Assembly at its 2002 Session, threatens to withdraw by appropriation \$80,000,000 annually from the Highway Trust Fund in the form of a purported "recurring inflationary adjustment", contrary to the original legislative intent and letter of the Highway Trust Fund law.

19. Again, the Defendant State of North Carolina, acting through the General Assembly at its 2002 Special Session, threatens to withdraw \$125,000,000 from the Highway Trust Fund in the form of a purported "loan" stating an "intent" to return the trust funds during fiscal years 2004-2005 through 2008-2009.²

20. Plaintiffs do not challenge the right of the Legislature to enact new legislation relating to collection taxes prospectively and appropriate prospectively expenditures relating to intrastate highways,

¹ Senate Bill 1005, Sess. Law 2001, c. 424.

² Senate Bill 1115, Sess. 2002, c. 126, Sec. 2.2g.

urban loops, city streets, secondary roads and bond debt service. Plaintiffs' claims for relief relate to unlawful and unconstitutional spending of Highway Trust Funds for purposes not specified by tax laws at the time of collection as required by the Constitution and the threat of future misappropriation.

21. Rather than long before February, 2002, as far back as 1999, "effecting the necessary economies in expenditures" in the biennial budget expenditures as required by the Constitution, the defendants took, or caused to be taken, from the Highway Trust Fund special revenues that Plaintiffs and others had paid for "special purposes" expressly and unequivocally designated by law and protected by the Constitution. Defendants failed thereby to "faithfully execute" statutory laws and the Constitution in violation of their oath of office.

22. Defendants purport to justify their unconstitutional actions by an alleged "declaration of existence of a fiscal emergency." Under the law, an "emergency" is a status brought about suddenly and without warning. Deficiencies in the state's budget brought about by expenditures of more dollars than the state was receiving in general fund revenue from the taxpayers began in fiscal year 1999-2000, not as late as February 2002.

23. Duties of the Treasurer with respect to disbursing public moneys are limited by statute. G.S. §147-68 provides in part:

(b) No moneys shall be paid out of the treasury except on warrant unless there is a legislative appropriation or authority to pay the same.

and

(e) The State Treasurer shall except as provided in G.S. §143-25³ be independent of any fiscal control exercise by the [Governor] ... and shall be responsible to ... the People of North Carolina for the ... faithful exercise of the responsibilities of his office.

The 2002 General Assembly Session misdirected highway trust funds and authorized trust funds to be spent by the executive branch. The Legislature had no power to appropriate trust funds already collected and deposited in the Highway Trust Fund for multi-year spending by the Department of Transportation pursuant to previous appropriations by laws enacted by the 1989 General Assembly and legislatures since then.

³ This statute relates only to "maintenance appropriations" and cross-references to the Governor's limited authority under Art. III, Sec. 5(3) to reduce only "maintenance appropriations" and the "revenues out of which such [maintenance] appropriations are made." It does not authorize or even pertain to expenditures from the Highway Trust Fund. For further definition and explanation of "maintenance appropriations, see G.S. § 143-23.

24. One liability of the Highway Trust Fund is debt service on bonds issued in 1997. Highway bonds are obligations and contracts of the defendant State. Bonds are contracts sold in the public bond market. The bond contracts contain promises by the issuer, the State of North Carolina, to make periodic payments of principal and interest to bond purchasers. The approximate yearly amount of obligation is in excess of \$25,000,000. Bond holders were promised timely and full payments from the Highway Trust Fund.

25. Security for and promises of periodic re-payment of principal plus fixed interest as the 1996 Highway Bonds mature is full faith and credit of the State plus payment from monies on deposit in the Highway Trust Fund. Statutory provisions, as a matter of law, are part of the bond contracts. Executive Order No. 19 and other actions of defendants have the force and effect of law. Defendants, thus, have substantially impaired the obligations of bond contracts and threaten future impairment. As a matter of law impairment of security is impairment of the obligations of contract. Impairment of municipal bonds impacts negatively on the state's credit rating resulting in greater debt to the taxpayers.

FIRST CLAIM FOR RELIEF
(Impairment of Contract)

26. Allegations of Paragraphs 1 through 25 are incorporated herein by reference.

27. Defendants' actions impair the obligations of North Carolina bond contracts in violation of the U.S. Constitution, Art. I, Sec. 10 and the North Carolina Constitution, Art. 1, Sec. 19.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment re Gubernatorial Emergency Power)

28. Allegations of Paragraphs 1 through 27 are incorporated herein by reference.

29. Defendants' actions are contrary to the provisions of Art. III, Sec. 5(3) and Art. V, Sec. 5 of the Constitution of North Carolina.

THIRD CLAIM FOR RELIEF
(Enjoin Further Impairment of State Bond Obligations)

30. Allegations of Paragraphs 1 through 29 are incorporated herein by reference.

31. Defendants' actions constitute a real and immediate threat of further impairment of the obligations of Plaintiffs bondholder contracts.

FOURTH CLAIM FOR RELIEF
(Enjoin Further Depletion of Trust Funds From Special Revenue Account)

32. Allegations of Paragraphs 1 through 31 are incorporated herein by reference.

33. Defendants' actions constitute a real threat of further depletion of funds of the Highway Trust Fund in violation of the law and Constitution. The result of defendants' arbitrary and unconstitutional acts is failure of the State to meet its goals set forth in the 1989 Highway Trust Fund Plan.

FIFTH CLAIM FOR RELIEF
(Breach of Trust)

34. Allegations of Paragraphs 1 through 33 are incorporated herein by reference.

35. Defendants' actions constitute a breach of trust. A "trust" is a "trust." No reason, practical or legal, exists to have both a "highway fund" and a "highway trust fund" if holding the People's money in "trust" has any meaning.

SIXTH CLAIM FOR RELIEF
(Violation of Oath of Office)

36. Allegations of Paragraphs 1 through 35 are incorporated herein by reference.

37. Actions of the defendant officers of state government constitute violations of their oath of office to uphold and defend the laws and Constitution of the State of North Carolina and of the United States.

WHEREFORE Plaintiffs pray that the Court:

1. Enter judgment declaring unconstitutional and unlawful the actions of Defendants in ordering and allowing removal of public trust funds from the Highway Trust Fund and diverting public monies to unauthorized purposes.

2. Enter judgment requiring that Defendants return to the proper account all special revenues that rightfully should be on deposit in the Highway Trust Fund account maintained by the Treasurer.

3. Enter judgment declaring that the Constitution requires a Governor to balance the state budget by "effecting the necessary economies in expenditures," not by raising additional revenues by diverting special revenue and trust accounts or taking or "borrowing" from other tax sources created by law stating "the special object to which [the tax] is to be applied."

4. Enter judgment declaring that the Constitution requires that taxes collected for a specific purpose "shall be applied to no other purpose."

5. Enter judgment taxing the costs of this action against defendants and granting such other and further relief deemed proper.

This the 14th day of November, 2002.

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