

IN THE SUPREME COURT OF NORTH CAROLINA

No. 443A09

FILED: 8 OCTOBER 2010

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

v.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the
decision of a divided panel of the Court of Appeals, ___ N.C.
App. ___, 683 S.E.2d 237 (2009), affirming in part and reversing
in part a judgment and order entered 27 March 2008 by Judge
Joseph R. John, Sr., in Superior Court, Wake County. Heard in
the Supreme Court 7 September 2010.

*Boyce & Isley, PLLC, by G. Eugene Boyce and R. Daniel
Boyce; and North Carolina Institute for Constitutional
Law, by Robert F. Orr and Jeanette K. Doran, for
plaintiff-appellees.*

*Roy Cooper, Attorney General, by Norma S. Harrell,
Special Deputy Attorney General, John F. Maddrey,
Assistant Solicitor General, and Christopher G.
Browning, Jr., Solicitor General, for defendant-
appellants.*

*Womblé Carlyle Sandridge & Rice, PLLC, by Burley B.
Mitchell, Jr. for James E. Holshouser, Jr., James B.
Hunt, Jr., James G. Martin, Willis P. Whichard, John L.
Sanders, and Marvin Dorman, amici curiae.*

*Blanchard, Miller, Lewis & Isley, P.A., by E. Hardy
Lewis, for Joe Hackney, Harold J. Brubaker, Hugh
Holliman, Paul Stam, Marc Basnight, Dan Blue, Daniel G.
Clodfelter, Fletcher L. Hartsell, Jr., Martin L.
Nesbitt, Jr., and National Conference of State
Legislatures, amici curiae.*

PER CURIAM.

-2-

Justice TIMMONS-GOODSON took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. See, e.g., *Formyduval v. Britt*, 361 N.C. 215, 639 S.E.2d 443 (2007); *Pitts v. Am. Sec. Ins. Co.*, 356 N.C. 292, 569 S.E.2d 647 (2002).

AFFIRMED.

NO. COA08-754

NORTH CAROLINA COURT OF APPEALS

Filed: 15 September 2009

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

v.

Wake County
No. 02 CVS 015253

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

Appeal by plaintiffs from judgment and order entered 27 March
2008 by Judge Joseph R. John, Sr., in Wake County Superior Court.
Heard in the Court of Appeals 28 January 2009.

*Boyce & Isley, PLLC, by G. Eugene Boyce, R. Daniel Boyce and
Philip R. Isley, for plaintiff appellants.*

*Attorney General Roy Cooper, by Special Deputy Attorney
General Norma S. Harrell and Assistant Solicitor General John
F. Maddrey, for defendant appellees.*

HUNTER, JR., Robert N., Judge.

Plaintiffs request a declaratory judgment asking whether the
transfer to the General Fund of \$80,000,000 by the Governor and
\$125,000,000 by statute from funds appropriated in 2001 to the
North Carolina Highway Trust Fund ("Trust Fund") were contrary to
provisions of the North Carolina Constitution dealing with public
funds, specifically N.C. Const. art. III, § 5(3) and N.C. Const.
art. V, § 5. On cross motions for summary judgment, the trial court

-2-

held both transfers to be lawful. We affirm in part the trial court with regard to the statutory transfer of \$125,000,000 but reverse with regard to the Governor's transfer of \$80,000,000. As to the other matters raised in the appeal, we affirm the trial court, as discussed herein.

I.

A. Legislative History¹

The General Assembly created the North Carolina Highway Trust Fund ("Trust Fund") in 1989, establishing a special account within the State Treasury to provide multi-year funding for highway construction and maintenance. 1989 N.C. Sess. Laws ch. 1933-97. The Trust Fund receives monies flowing from several revenue streams, including motor vehicle title and registration fees; motor fuels excise taxes; alternative fuels excise taxes; motor vehicle use taxes; and interest and income earned by the Trust Fund. As originally enacted, Trust Fund revenues were to be used only for specified projects of the Intrastate Highway System, for specific urban loop highways, and to provide supplemental appropriations for specific secondary roads and for city streets, with a small portion of the Trust Fund allotted for administrative expenses.

In addition, the 1989 statute creating the Trust Fund directed that a portion of the funds be transferred each year from the Trust Fund to the State's General Fund. *Id.* at 1982-83. As originally

¹ The facts and procedural history are substantially the same as cited by the Supreme Court in *Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006) but have been supplemented to add facts relevant to the consideration of issues broader than "standing."

-3-

enacted, N.C. Gen. Stat. § 105-187.9 (2007) stated: "In each fiscal year the State Treasurer shall transfer the sum of . . . (\$170,000,000) of the taxes deposited in the Trust Fund to the General Fund[.]"² This transfer has been made in each succeeding fiscal year, though the amount transferred each year varied in accordance with fluctuations in motor vehicle use tax collections as required by N.C. Gen. Stat. § 105-187.9(b)(2) and in response to loans made from and payments made to the Trust Fund by the Legislature. In 1989, \$279,400,000 was transferred to the General Fund. 1989 N.C. Sess. Laws ch. 1983-84.

On 21 September 2001, in the 2001 N.C. Sess. Laws ch. 424, the "Current Operations and Capital Improvements Appropriations Act of 2001" ("Appropriations Act of 2001", or "Act") was read three times in the General Assembly and ratified. 2001 N.C. Sess. Laws ch. 424. Subsequently, the Act was signed into law by Governor Easley at 11:15 a.m. on 26 September 2001. *Id.* The Act set spending for the 2001-2003 biennial fiscal years. The Act amended section 105-187.9 so as to continue the yearly transfer of \$170,000,000 from the

²N.C. Gen. Stat. § 105-187.9, states:

(2) In addition to the amount transferred under subdivision (1) [the \$170,000,000] of this subsection, the sum of one million seven hundred thousand dollars (\$1,700,000) shall be transferred in the 2001-2002 fiscal year. The amount distributed under this subdivision shall increase in the 2002-2003 fiscal year to the sum of two million four hundred thousand dollars (\$2,400,000). In each fiscal year thereafter, the sum transferred under this subdivision shall be the amount distributed in the previous fiscal year plus or minus a percentage of this sum equal to the percentage by which tax collections under this Article increased or decreased for the most recent 12-month period for which data are available.

-4-

Trust Fund to the General Fund: in the 2001-2002 fiscal year, the sum of \$1,700,000; in the 2002-2003 fiscal year, the sum of \$2,400,000.

In each fiscal year thereafter, the sum transferred under this subdivision shall be the amount distributed in the previous fiscal year plus or minus a percentage of this sum equal to the percentage by which tax collections under this article increased or decreased for the most recent 12-month period for which data are available.

N.C. Gen. Stat. § 105-187.9(b)(2).

Approximately four months after the passage of the Act, on 5 February 2002, the Governor issued Executive Order 19 ("Executive Order 19" or "Order"). The Order recites that a "'deficit' is defined as having been incurred when total expenditures for the fiscal period of the budget exceed the total of receipts during the period, plus the surplus remaining in the State Treasury at the beginning of the period." Exec. Order No. 19, 16 N.C. Reg. 1866 (Mar. 1, 2002). The fiscal period began 1 July 2001. *Id.*

The Order includes nine sections affecting the expenditure of funds collected by the State. Section 5 and section 9 are relevant to our analysis. Section 5 of Executive Order 19 states, "[The Office of State Budget and Management] may transfer, as necessary, funds from the Highway Trust Fund Account for support of General Fund appropriation expenditures." Exec. Order No. 19, 16 N.C. Reg. 1866 (Mar. 1, 2002). Accordingly, on 8 February 2002, the State Budget Officer directed that \$80,000,000 be debited from the Trust Fund and credited to the General Fund.

Section 9 of Executive Order 19 reads as follows:

-5-

The Office of the State Controller, as advised by the State Budget Officer, is directed to receive the local government reimbursement funds and to escrow such funds in a special reserve as established by [the Office of State Budget Management]. Return of all such receipts shall be made to the local government reimbursement funds, if possible, after determination that such funds are not necessary to address the deficit.

Exec. Order No. 19, 16 N.C. Reg. 1866 (Mar. 1, 2002).

Subsequent to Executive Order 19, the General Assembly convened in Extra Session on 14 May 2002 and convened for the continuing Regular Session on 28 May 2002. An examination of the Session Laws passed by the General Assembly during these sessions reveals that the Legislature modified two provisions of the Act which concerned provisions of the Order. In the 2001 Regular Session, the Legislature abolished local government reimbursement statutes effective as of 1 July 2003. 2001 N.C. Sess. Laws chs. 2105-06. At the 14 May 2002 Session, the Legislature changed the effective date for repealing the local government reimbursement statutes from 1 July 2003 to 1 July 2002. 2002 N.C. Sess. Laws ch 503. The General Assembly also made appropriations from the Trust Fund for road construction; however, unlike the local reimbursement act appropriation, the Governor's transfer of \$80,000,000 from the Trust Fund to the General Fund was not addressed by the Legislature. 2002 N.C. Sess. Laws ch. 302.

Because the State budget deficit continued for the 2002-2003 fiscal year, the General Assembly transferred \$125,000,000 from the Trust Fund to the General Fund, effective 1 July 2002, in addition to the previously appropriated \$170,000,000. 2002 N.C. Sess. Laws

-6-

chs. 298-99. The General Assembly treated this transfer as a loan from the Trust Fund to the General Fund, committing to return the \$125,000,000, including interest, to the Trust Fund during fiscal years 2004-2005 through 2008-2009. *Id.* at 298-99, 457. Subsequently, in fiscal year 2004-2005, the General Assembly reduced the yearly transfer of funds from the Trust Fund to the General Fund by \$10,000,000 as a payment on this loan, see 2002 N.C. Sess. Laws ch. 457, and forgave the remainder of the loan in fiscal year 2005-2006. 2005 N.C. Sess. Laws ch. 674. In fiscal year 2006-2007, however, the General Assembly paid the remainder of the loan by again reducing the yearly transfer of funds from the Trust Fund to the General Fund by \$115,000,000. 2006 N.C. Sess. Laws ch. 1523.

B. Procedural History

On 14 November 2002, plaintiffs Goldston and Harrington, as North Carolina citizens and taxpayers, brought suit against the State and Governor. Plaintiffs alleged the transfers of \$80,000,000 by the Governor and \$125,000,000 by the General Assembly from the Trust Fund to the General Fund were unlawful diversions of Trust Fund assets because disbursement of those funds is not allowed for any projects other than those specified by statute. The pertinent statute states that the "special objects" of the Trust Fund are the intrastate highways, urban loops, city streets, secondary roads, debt service, and Department of Transportation administrative expenses. N.C. Gen. Stat. § 136-176(b) (2007). Plaintiffs also contended these transfers violated the North Carolina Constitution,

-7-

which mandates that "[e]very 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." N.C. Const. art. V, § 5. Plaintiffs asserted that the statutorily defined "special objects" of the Trust Fund preclude use of Trust Fund assets for General Fund expenditures. Finally, plaintiffs alleged the Governor exceeded his constitutional authority under article III, section 5(3). This provision requires the Governor to administer the budget and "[t]o insure that the State does not incur a deficit for any fiscal period," but does not, plaintiffs contended, authorize the Governor to order transfers from the Trust Fund to the General Fund because the Trust Fund is separate from the General Fund and the annual budget process. N.C. Const. art. III, § 5(3).

Filing suit both as individual taxpayers and on behalf of other citizens similarly situated, plaintiffs alleged they were injured because they had paid motor fuel taxes, title and registration fees, and other highway taxes, which by law were collected expressly for application to the Trust Fund but had been diverted for other uses. They argued defendants' actions constituted both a current and future threat of illegal and unconstitutional depletion of Trust Fund assets.

Plaintiffs requested injunctive and declaratory relief, seeking both a declaration that defendants' actions were illegal and unconstitutional, and an immediate return of the monies at issue to the Trust Fund. Plaintiffs later abandoned their prayer

- 8 -

for relief in the nature of mandamus through which they had requested return of the funds, but they continued to maintain that they faced the threat of future illegal and unconstitutional disbursements from the Trust Fund. In response, the State and the Governor filed a motion to dismiss, arguing that plaintiffs lacked standing "in that they have failed to allege the necessary facts to bring this suit: based on their status as citizens or taxpayers or bondholders; based on any alleged contractual or impairment claim; or on any other basis establishing their right to bring such claim against defendants." Defendants also claimed that plaintiffs failed to state a claim for relief. Plaintiffs and defendants both filed motions for summary judgment.

In an order entered 29 January 2004, the trial court granted summary judgment in defendants' favor. Plaintiffs appealed to this Court which held the "dispositive" issue in the appeal was "whether the plaintiffs have standing." This Court initially held plaintiffs lacked standing to bring this action and so holding determined it was "unnecessary . . . to address the remaining issues briefed by the parties." *Goldston v. State*, 173 N.C. App. 416, 422, 618 S.E.2d 785, 790 (2005) (*Goldston I*). Subsequently, the Supreme Court reversed the decision of this Court, held plaintiffs had standing, and remanded the case to the Court of Appeals for further remand to the trial court. *Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006) (*Goldston I*).

Upon remand, plaintiffs and defendants both renewed their cross motions for summary judgment. By order filed 27 March 2008,

-9-

the trial court "reaffirmed" its prior grant of summary judgment to defendants and held that "[a]s a matter of law, Defendants did not violate the provisions of the North Carolina Constitution or act unlawfully in any way complained of by the Plaintiffs." The trial court furthermore held: "Plaintiffs are not entitled to re-litigate the previously entered Judgment for Defendants that was on the merits and that has never been vacated, [or] reversed" by an appellate court. From this decision, plaintiffs timely appeal.

C. Jurisdiction

In *Goldston I*, only the issue of plaintiffs' standing was resolved by the Supreme Court. In that case, plaintiffs sought review of all the issues raised in their subsequent appeal, *i.e.*, the present appeal. In North Carolina courts, the law of the case applies only to issues that were decided in the former proceeding, whether explicitly or by necessary implication, but not to questions which might have been decided but were not. "[T]he doctrine of the law of the case contemplates only such points as are actually presented and necessarily involved in determining the case." *Hayes v. Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 682 (1956). Therefore, this Court has jurisdiction to address the issues not resolved but presented in plaintiffs' initial appeal.

D. Standard of Review

In their briefs, both parties agree that the issues to be determined are matters of law. Both parties also agree that the standard of review for these matters is *de novo*. "It is well settled that *de novo* review is ordinarily appropriate in cases

-10-

where constitutional rights are implicated." *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

II.

Because we review questions of law de novo, we give no deference to the trial court's rulings on its own limits of judicial authority, its alleged inappropriate use of collateral estoppel, its findings of fact, or its conclusions of law. Our de novo review is to determine "'whether, on the basis of the materials presented to the trial court, (1) there is a genuine issue of material fact and, (2) whether the movant is entitled to judgment as a matter of law.'" *21st Mortgage Corp. v. Douglas Home Ctr., Inc.*, 187 N.C. App. 770, 773, 655 S.E.2d 423, 425 (2007) (citation omitted). Therefore there is no need to address plaintiffs' first, second, third, and seventh arguments.

Our review of "materials presented to the court" necessarily involves a review of matters plaintiffs submitted for judicial notice, which includes documents published by the North Carolina Legislature's Fiscal Research Division and certain newspaper articles. These are materials the trial court failed to consider on remand. Under N.C. Gen. Stat. § 8C-1, Rule 201(f) (2007), judicial notice may be taken at any stage of the proceedings. Section (c) allows a court to take judicial notice whether requested or not. N.C.G.S. § 8C-1, Rule 201(c). To the extent these materials submitted to the trial court contain adjudicated facts and refer to statutes, we have considered these materials in

-11-

our review. Since the parties stipulated to the facts, however, and the issues under review are jointly recognized to be matters of law, it is unclear that plaintiffs were prejudiced by the exclusion of the materials sought to be included at the trial court level. Therefore, we conclude plaintiffs' sixth argument appealing the exclusion of these materials is without merit.

Plaintiffs' fifth argument concerns handling of public "trust" funds. Plaintiffs contend that "[d]efendants violated fundamental principles of expenditures of public money held in [the] trust fund." Plaintiffs argue that because the Trust Fund is labeled a "trust fund," North Carolina law prohibits use of money held in this trust fund for any purposes other than those authorized when the trust was formed. Plaintiffs state: "[T]here can be no doubt that North Carolina's General Assembly meant to protect highway use taxes collected for specific purposes from being diverted to expenditures other than those specified by the Highway Trust Fund Act." Specifically, according to plaintiffs, these funds are restricted by trust for the sole purpose of funding the "intrastate highway system, urban loops around seven major North Carolina cities, city streets and secondary roads." Plaintiffs add: "There is no doubt that the legislature, by labeling this 'account' a 'trust fund' had every intention of protecting the money from 'raids' or 'diversions'" for other purposes.

In addition plaintiffs, by analogy, argue that the "special object" language of article V, section 5 of the N.C. Constitution would protect appropriations of Trust Funds in the same manner that

-12-

article V, section 6(2) protects Teachers' and State Employees' Retirement System Trust Funds. These arguments are not persuasive on several grounds.

First, the Trust Fund lacks the indicia of a trust. In creating a trust, a settlor deposits funds "in trust" to a trustee for the benefit of a third party, the beneficiary. The trustee is granted limited discretionary powers over the spending of the funds and is subject to an accounting and fiduciary duties. The legal relationships here lack these elements.

Second, the language creating the Trust Fund is ambiguous concerning whether the Trust Fund was intended to be a "true" trust fund. N.C. Gen. Stat. § 136-176 (2007) states: "Creation, revenue sources, and purpose of North Carolina Highway Trust Fund[:] (a) A special account, designated the North Carolina Highway Trust Fund, is created within the State treasury." This language merely states that a "special account . . . is created within the State treasury[,] " not a trust fund.

Third, the Trust Fund is not constitutionally protected in the same manner as the Teachers' and State Employees' Retirement System. The State is correct that article V, section 6(2) is explicit in its protection of retirement funds in that such funds cannot be used for any other purpose or be applied, diverted, loaned to, or used, by the State or any of its officers or agencies. As the State correctly notes, this Court in *Stone v. State*, __ N.C. App. __, 664 S.E.2d 32 (2008), held that the Governor was not able under article III, section 5 to escrow the

-13-

Retirement System employer contributions to meet budget shortfall projections. Clearly, other sections of the Constitution governing specific procedures in the handling of public funds bind the Governor's powers under article III, section 5. The Trust Fund is not entitled to this same explicit level of constitutional protection that State employees' retirement funds enjoy. Plaintiffs' analogy is not persuasive.

Fourth, the interpretation plaintiffs urge would allow one General Assembly to bind future Legislatures' handling of revenues. One General Assembly traditionally cannot bind another. *Kornegay v. Goldsboro*, 180 N.C. 441, 451, 105 S.E. 187, 192 (1920); *R. R. v. Oates*, 164 N.C. 167, 170, 80 S.E. 398, 399 (1913). Section 105-187.9 evinces the intention of the General Assembly to use part of the Trust Fund money to supplement the General Fund. Similar legislation mandating the transfer of certain Trust Fund money to the General Fund was enacted in the same session that created the Trust Fund. 1989 N.C. Sess. Laws chs. 1934-41, 1979-83. Like all appropriation statutes, the shifting of funds from one year to the next may be changed by the Legislature.

Even assuming *arguendo* that the Trust Fund is a true "trust fund," the General Assembly has determined that one of the "objects" of the Trust Fund is to supplement the General Fund. Use of the Trust Fund monies for this purpose thus cannot be viewed as a "raid" of the Trust Fund for purposes not previously sanctioned by the General Assembly. Consequently, we deny plaintiffs' appeal on its "trust fund" argument.

-14-

III.

Plaintiffs allege in their complaint that the General Assembly violated article V, section 5 of our Constitution by diverting \$125,000,000 from the Trust Fund to the General Fund on 1 July 2002. Statutorily this is an accurate statement. An examination of the appropriations statutes following this "diversion," however, reveals that the General Assembly has reimbursed or paid back to the Trust Fund the \$125,000,000 diverted in 2001. Plaintiffs attempted to illustrate this payment history or "forgiveness" in their motions for judicial notice, which included material from the Legislative Research Division containing statutory citations to appropriations acts. An examination of these and subsequent statutes shows that after the balance of the \$125,000,000 loan was "forgiven" in fiscal year 2005-2006, 2005 N.C. Sess. Laws ch. 674, the Legislature repaid the balance of the loan in full in fiscal year 2006-2007, 2006 N.C. Sess. Laws ch. 1523.

This payment history in all probability led plaintiffs not to specifically reference the General Assembly in any of their assignments of error. Plaintiffs do not argue in their brief to this Court that the General Assembly violated any provisions of the North Carolina Constitution. Plaintiffs have thus failed to preserve this argument for appellate review. N.C. R. App. P. 28(a)-(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."); *Jay Group, Ltd. v. Glasgow*, 139 N.C. App. 595, 602, 534 S.E.2d 233, 237-38, *disc.*

-15-

review denied, 353 N.C. 265, 546 S.E.2d 100 (2000). Because the funds have been repaid, and the claim is moot, we affirm the trial court's summary judgment order as to the \$125,000,000. There is no need for remand, and we do not further address this claim.

IV.

The dispositive issue in this appeal is determining the meaning of the phrase "effect the necessary economies" as contained in N.C. Const. art. III, § 5(3), and how this end was accomplished by the transfer of \$80,000,000 from the Trust Fund to the General Fund.

Article III, section 5 requires that the Governor "shall effect the necessary economies in State expenditures." In order for the Governor to exercise his powers to "effect the necessary economies," he must survey revenue collections to avoid a deficit in the State budget which occurs whenever he "determines that receipts during the fiscal period, when added to any surplus remaining in the State Treasury at the beginning of the period, will not be sufficient to meet budgeted expenditures." N.C. Const. art. III, § 5(3). The deficit which the Governor is to prevent is also defined in article III, section 5(3) as being present when "[t]he total expenditures for the State for the fiscal period covered by the budget shall not exceed the total of receipts during that fiscal period and the surplus remaining in the State Treasury at the beginning of the period." *Id.* (emphasis added).

Article III, section 5(3) has been the subject of two prior opinions of this Court and one advisory opinion of the Supreme

-16-

Court. *Stone*, ___ N.C. App. at ___, 664 S.E.2d at 32; *County of Cabarrus v. Tolson*, 169 N.C. App. 636, 610 S.E.2d 443 (2005); *Advisory Opinion In re Separation of Powers*, 305 N.C. 767, 295 S.E.2d 589 (1982). These decisions necessarily inform our decision in this case on the meaning of the phrase "effect the necessary economies."

In *In re Separation of Powers*, the North Carolina Supreme Court explained the constitutional process by which public funds are handled:

Our Constitution mandates a three-step process with respect to the State's budget. (1) Article III, Section 5(3) directs that the "Governor shall prepare and recommend to the General Assembly a comprehensive budget . . . for the ensuing fiscal period." (2) Article II vests in the General Assembly the power to enact a budget [one recommended by the Governor or one of its own making]. (3) After the General Assembly enacts a budget, Article III, Section 5(3) then provides that the Governor shall administer the budget "as enacted by the General Assembly."

305 N.C. at 776, 295 S.E.2d at 594 (quoting N.C. Const. art. III, § 5(3)).

The Governor's duty to administer the budget "as enacted by the General Assembly" under article III, section 5 equates with article V, section 7 and article III, section 5(4) of this State's Constitution. Article III, section 5(4) requires that the Governor take care that the laws be faithfully executed. The Governor as head of the executive department is charged with the duty of seeing that legislative acts are carried into effect. *Winslow v. Morton*, 118 N.C. 486, 489-90, 24 S.E. 417, 418 (1896). Article V, section

-17-

7 requires that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law[.]" Subsection 1 of this section means that there must be legislative authority in order for money to be validly drawn from the treasury. In other words, the legislative power is supreme over the public purse. *White v. Hill*, 125 N.C. 194, 200, 34 S.E. 432, 433 (1899) (citing *Garner v. Worth*, 122 N.C. 250, 252, 29 S.E. 364, 365 (1898)) (decided under former article XIV, section 3); accord *State v. Davis*, 270 N.C. 1, 14, 153 S.E.2d 749, 758, cert. denied, 389 U.S. 828, 19 L. Ed. 24, 84 (1967).

These supporting cases were decided at a time in our history before enactment of present article III, section 5; however, they inform our decision here because they represent settled law as to the understanding of the legislative power under this State's Constitution with regard to its power to appropriate and the duty of the Governor to execute the laws. N.C. Const. art. III, § 5.

The construction of the term "effect the necessary economies" is an ambiguous term, requiring judicial construction. *Young v. Whitehall Co.*, 229 N.C. 360, 367, 49 S.E.2d 797, 801 (1948); *Milk Commission v. Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967) ("[I]ntent must be found from the language of the act, its legislative history, and the circumstances surrounding its adoption[.]"); *Ingram v. Johnson, Comr. of Revenue*, 260 N.C. 697, 699, 133 S.E.2d 662, 664 (1963) ("[I]t is proper to look to legislative history, judicial interpretation of prior statutes dealing with the question, and the changes, if any, made following

-18-

a particular interpretation."). When "interpreting our Constitution--as in interpreting a statute--where the meaning is clear from the words used, we will not search for a meaning elsewhere." *State, ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478-79 (1989). Additionally, the Supreme Court emphasized that "[a]ll power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *Id.* at 448-49, 385 S.E.2d at 478 (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961)).

Prior to 1925, when the State enacted the Executive Budget Act, N.C. Gen. Stat. §§ 143-1 through -34.9, the General Assembly prepared and adopted the State budget, which the Governor and agencies administered. STEPHEN N. DENNIS, RECENT CHANGES IN THE APPROPRIATIONS PROCESS, POPULAR GOVERNMENT, Institute of Government (1975). Subsequently, in 1968 in rewriting article III, section 5(3), the Governor's budgetary duties were given "constitutional status. The Governor's 'present' statutory duty for preparing and recommending the state budget to the General Assembly and then for administering it after enactment became a constitutional responsibility[.]" N.C. STATE CONST. STUDY COMM'N, REPORT OF THE N.C. STATE CONST. STUDY COMM'N 31 (1968). The present language of article III, section 5 was adopted in 1977. Article III, section 5 of the North Carolina Constitution, "Duties of Governor[,]" in relevant part states:

-19-

Budget. The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor.

The total expenditures of the State for the fiscal period covered by the budget shall not exceed the total of receipts during that fiscal period and the surplus remaining in the State Treasury at the beginning of the period. To insure that the State does not incur a deficit for any fiscal period, the Governor shall continually survey the collection of the revenue and *shall effect the necessary economies in State expenditures*, after first making adequate provision for the prompt payment of the principal of and interest on bonds and notes of the State according to their terms, whenever he determines that receipts during the fiscal period, when added to any surplus remaining in the State Treasury at the beginning of the period, will not be sufficient to meet budgeted expenditures.

N.C. Const. art. III, § 5(3) (emphasis added).

This language requires the Governor to recommend a "comprehensive" budget, although the Legislature is not required to adopt the budget as recommended. The Governor has a continuing duty, however, to administer whatever budget is adopted by the Legislature; this is a specific application of the Governor's duty to execute the laws. JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION WITH HISTORY AND COMMENTARY* 96 (University of North Carolina Press 1995).

During the time the 1977 amendment was adopted and until the passage of the Separation of Powers Act in 1983, the determinations of budget reductions and transfers between budgets were handled jointly by the Governor and the "Advisory Budget Commission"

-20-

("ABC"). 1983 N.C. Sess. Laws chs. 735-46. This joint "executive-legislative" administration of the budget was altered legislatively following the decisions in *Wallace v. Bone*, 304 N.C. 591, 286 S.E.2d 79 (1982) and *In re Separation of Powers*, 305 N.C. 767, 295 S.E.2d 589.

This brief period both before and after enactment of the 1977 constitutional amendment informs our consideration of what acts the drafters of the amendment considered to be "effect[ing] the necessary economies." Because prior budget acts were jointly administered by the Legislative and Executive branches, one cannot conclude that the Legislature, in enacting the 1977 amendments, intended to give the Governor appropriation power to redirect spending absent some explicit legislative concurrence. Had the Legislature intended to allow the Governor to redraw the Appropriations Acts wholesale, the Legislature would have provided an explicit provision for such a change.

Viewing the Constitution textually, this interpretation makes functional and operational sense because it separates the powers of appropriation between two of the branches of government. The Governor may veto budgetary acts thereby stopping spending that he or she disapproves. Constitutional limitations on expenditures of public funds by either branch require due process of law as set forth in constitutional provisions read as a whole.

It is unlikely that the phrase "effect the necessary economies" could be plainly read to mean that the Legislature, in proposing the amendment to this article, or the People in ratifying

-21-

the amendment, could have construed the plain meaning of these words to grant the Governor the unfettered power to transfer funds without specific legislative authority.

The alternative interpretation would allow a Governor the "broad" power to remake the budget allocations without legislative concurrence. One cannot deny that a Governor acting alone is more efficient and practical in addressing a deficit or any problem. Our constitutional history in government, however, has chosen to employ separate, divided powers to address governance--including the allocation of tax revenue through the budget. Although divided government is a less efficient and more impractical method of governing, our history and experience with authority cautions us against entrusting unbridled expenditure authority in any one person. Article I, section 35 of this State's Constitution states that "a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." In our Constitution, the authority to appropriate funds is jointly exercised by the Legislature through the power to make laws and the Governor through the veto.³ Once a budget is enacted, it is textually unsupportable to contend that the Governor then holds the power to unilaterally amend the budget in violation of statute.

Article III, section 5, requires the Governor to prevent a deficit giving consideration to total expenditures and total

³Since the passage of article III, section 5, the Legislature has met every year, in part to revise the state budget. In addition to these annual first and second sessions, the Legislature has met for extra sessions 26 times since 1977 at the call of the Governor to address issues requiring immediate legislative action.

-22-

revenues. Temporary halts in expenditures, escrowing of funds awaiting legislative action, furloughs and other similar actions are constitutional because these actions reduce "total expenditures." Diverting the Highway Trust Fund to the General Fund and expending the money does not reduce the "total expenditure" of state government but merely transfers money contrary to the budget appropriation statute. A transfer of this nature does not avoid the deficit but merely continues the status quo, which the phrase "necessary economies" under article III, section 5 is required to alter. Furthermore the transfer of these funds, designated by the budget statute for one purpose and transferred by the Governor to another does not fulfill the Executive's duty to administer the budget enacted by the Legislature, nor does it assure that the laws are faithfully executed.

With this framework of constitutional authority and the persuasive authority of *In Re Separation of Powers*, we examine prior decisions of this Court. In *Tolson*, 169 N.C. App. 636, 610 S.E.2d 443, this Court affirmed the trial court's determination that the provisions of Executive Order 19 that escrowed local government tax reimbursements and local government tax-sharing funds to a reserve where they would await a determination that they would be necessary to address the budget are within the authority granted to the Governor under article III, section 5(3). Executive Order 19 states that the funds would be returned to "local government reimbursement funds, if possible, after determination

-23-

that such funds are not necessary to address the deficit." Exec. Order No. 19, sec. 9, 16 N.C. Reg. 1866 (Mar. 1, 2002). Neither the Executive Order nor the *Tolson* Court addressed which branch or branches of government would make the determination, after escrow, as to whether such funds would be necessary to address the budgetary deficit.

Subsequent statutory history demonstrates this determination was made by the Legislative and Executive branches jointly as each of the statutory provisions establishing local government tax reimbursements was repealed by the General Assembly pursuant to Session Law 2001-424, § 34.15(a) as amended by Session Law ch. 2002-126, § 30A.1, effective 1 July 2002. 2001 N.C. Sess. Laws ch. 2105-06; 2002 N.C. Sess. Laws ch. 503. By the time this Court heard *Tolson* in 2005, the statute directing the expenditures had been repealed, and the money reallocated by the Legislature in its 2002 sessions. The funds for reimbursement of the local government therefore were extinguished by the Governor and the Legislature acting jointly to balance the budget.

Unlike plaintiffs herein, the *Tolson* plaintiffs did not assert or claim to represent citizen interests in the Trust Fund. While the *Tolson* Court addressed the withholding of local government tax reimbursements and tax-sharing funds, plaintiffs herein raise issues with the transfer of Trust Fund monies as directed by section 5. See *Tolson*, 169 N.C. App. 637, 610 S.E.2d 445; Exec. Order 19, secs. 7, 9, 16 N.C. Reg. 1866 (March 1, 2002). Indeed, the *Tolson* Court did not address any of the other sections of

-24-

Executive Order 19, and none, except Section 5 dealing with the Trust Fund, appear to divert funds in a manner which excluded participation by the General Assembly.

Tolson holds that the phrase "effect the necessary economies" does allow the Governor to escrow funds appropriated by the Legislature. Stopping spending or escrowing funds has an obvious nexus with the purpose of the power conferred to prevent a deficit by stopping expenditures for which there is no revenue, until such time as the co-equal branch of government can meet and the Governor and Legislature can remedy the deficit by either reducing expenditures or increasing revenue. By escrowing the funds the Governor halts the total expenditures of the government as they relate to total revenue, preventing a deficit.

The *Tolson* plaintiffs, however, did raise the same issue as plaintiffs herein with regard to article V, section 5 of the North Carolina Constitution. Here, *Tolson* is binding. N.C. Const. art. V, § 5 states: "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." The plaintiffs in *Tolson* argued that the funds withheld by the Governor were funds that the General Assembly allocated to local governments. *Tolson*, 169 N.C. App. at 639, 610 S.E.2d at 446. By holding those funds in escrow, the plaintiffs claimed the Governor applied those funds to an "object" and "purpose" not specified by the General Assembly. Finding that the Governor's actions did not violate the Constitution, the Court held: "[N]othing about Article V, Section

-25-

5 of the Constitution suggests that it is directed at the Governor and his duty to 'effect the necessary economies in State expenditures.' N.C. Const. art. III, § 5(3). Rather, the special objects language is directed at the General Assembly." *Id.* The *Tolson* Court further held that the Governor's withholding of the funds was not a violation of the separation of powers doctrine. *Id.* at 639, 610 S.E.2d at 446. In *Tolson*, the Governor exercised powers that were constitutionally committed to his office without invasion on the legislative branch's power. *Id.*

In *Stone*, ___ N.C. App. ___, 664 S.E.2d 32 (2008), this Court affirmed the trial court's injunction which held that the Governor's powers under article III, section 5(3) to "effect the necessary economies" were limited by article V, section 6(2) of the North Carolina Constitution. The State employee plaintiffs in *Stone* argued that Executive Order No. 3 was unlawful, because it directed the State Controller to receive the employer portions of retirement contributions for all State employees and to place them in a special escrow fund, pending a "determination that such funds were not necessary to address the deficit." *Stone*, ___ N.C. App. at ___, 664 S.E.2d at 34. This language is identical to that portion of Executive Order No. 19 at issue in *Tolson*. The Court also held that placing the funds in temporary escrow was an impermissible "diversion" in violation of the State Constitution and contractual guarantees to State retirees.

Stone and *Tolson* both involved the escrow of funds. While the *Tolson* Court held that article III, section 5(3) permitted the

-26-

Governor to transfer the funds in question to a temporary escrow account, thereby withholding them from local governments, the *Stone* Court held that placing the retirement contribution funds in a temporary escrow account was an impermissible "diversion" in violation of the explicit language of article V, section 6(2) and contractual guarantees to State retirees. *Tolson*, 169 N.C. App. at 640, 610 S.E.2d at 446 (determining that Executive Order 19 was a constitutional exercise of the Governor's authority); *Stone*, ___ N.C. App. at ___, 664 S.E.2d at 43-44. *Stone*, while not addressing *Tolson*'s holding, is instructive in that it illustrates that the Governor's powers under article III, section 5 are not constitutionally unlimited. *Stone* holds that other sections of the State Constitution, specifically article V, section 6(2), do provide a limitation on the Governor's abilities to "effect the necessary economies." *Stone*, ___ N.C. App. at ___, 664 S.E.2d at 37.

The case *sub judice* is factually distinct from *Tolson* because this case does not just involve escrowing money in a reserve account but also involves transferring funds, which the General Assembly has allocated for highway purposes to the General Fund, in violation of the statute, the "Appropriations Act of 2001." Because the Governor has a duty to "faithfully execute the laws," article V, section 5(4), a limit on the ability to "effect the necessary economies" would be the appropriation statutes enacted as a result of the constitutionally based procedures for expenditures contained in N.C. Const. art. II, §§ 22(6), 23. Likewise, article

-27-

V, section 7 limits the Governor's abilities to draw public money from the State Treasury, but "in consequence of appropriations made by law." The record is clear from which statutory appropriation the \$80,000,000 was transferred, but it is unclear to which statutory appropriation these funds went. Since the 2001-2002 appropriation act was never amended to authorize or ratify the transfer, the original appropriations act was the only constitutional enactment upon which the expenditure of these funds could have been drawn. It is obvious that the appropriation statute was not followed in the transferring of the \$80,000,000. We hold that while the Governor may "escrow" the Highway Trust Fund monies to prevent a deficit, he or she may not transfer appropriated Highway Trust Fund monies without awaiting appropriate legislative authority from the General Assembly.

What further distinguishes this case from *Tolson* is that the action of the Governor in transferring \$80,000,000 of Trust Fund monies directly into the General Fund without awaiting legislative action is that the transfer does not effect an economy, to wit: it does not reduce spending or diminish the deficit. Section 5 of Executive Order 19 reads as follows: "[The Office of State Budget and Management] may transfer, as necessary, funds from the Highway Trust Fund Account for support of General Fund appropriation expenditures." Exec. Order No. 19, 16 N.C. Reg. 1866 (Mar 1, 2002). This Order and the action of Secretary Tolson in transferring \$80,000,000 fails to effect any economy. In fact, this action was the very antithesis of effecting an economy as it

-28-

was explicitly intended to support General Fund appropriation expenditures. Ratification for the transfer was not subsequently adopted by the General Assembly. The appropriation statute effecting the spending of Trust Fund monies was not amended for the year 2001-2002.

As previously discussed, all other provisions of Executive Order 19 stop spending temporarily awaiting some unnamed power to make budgetary adjustments. Because we presume the Executive Order would follow a constitutional procedure, we read the Executive Order to refer to the General Assembly and the Governor in these proclamations as the appropriate bodies to make these adjustments. This action would be consistent with the text of the Constitution with regard to the manner in which public money is spent; the enacted appropriation statute; the historical practice which led up to the adoption of article III, section 5; the history of legislative action in both *Tolson* and *Stone*; and legislative history of the \$125,000,000 involved in this appeal.

IV.

We therefore reverse in part the trial court's order denying plaintiffs' Motion for Summary Judgment and granting defendants' Motion for Summary Judgment. We hold that the Constitution of North Carolina article III, section 5 is a grant of authority to the Governor, which is limited to escrowing or reducing budgeted expenditures and does not create a power to transfer and spend funds appropriated for one purpose to another purpose without statutory authority. We further declare the transfer of

-29-

\$80,000,000 from the Highway Trust Fund to the General Fund in fiscal year 2001-2002 by the Governor exceeded his constitutional authority under N.C. Const. art. III, § 5. We affirm the decision of the trial court with regard to the \$125,000,000 statutory transfer for reasons expressed above. Except as reversed herein, the trial court's order is otherwise affirmed.

Reversed in part; affirmed in part.

Judge JACKSON concurs.

Judge McGEE concurring in the result in part and dissenting in part with separate opinion.

CAROLINA JOURNAL ONLINE

Carolina Journal Exclusives

Split Supreme Court Means Easley Loses in Highway Trust Fund Dispute

Justices reach 3-3 decision on case focused on governor's constitutional powers

By CJ Staff

October 08, 2010

RALEIGH — An evenly split N.C. Supreme Court means that a lower-court ruling stands against former Gov. Mike Easley in a dispute over the governor's power to shift money out of the state's Highway Trust Fund.

The state's highest court issued its unsigned opinion this morning. It explains that justices deadlocked 3-3 on the issues surrounding the dispute. Justice Patricia Timmons-Goodson did not vote. She took no part in the Supreme Court's consideration or decision in the case.

The even split affirms the decision of the N.C. Court of Appeals, which ruled that the governor exceeded his constitutional power early in his first term of office when he transferred \$80 million from the Highway Trust Fund to the state's General Fund without legislative approval in order to balance the state budget.

"The Constitution and the people have prevailed," said Jeanette Doran, senior staff attorney for the N.C. Institute for Constitutional Law. NCICL joined the case last year at the request of the original plaintiffs' attorneys.

"The Court of Appeals decision will stand, and government accountability will stand with it," Doran said. "The people can count on the constitutional mandate that the General Assembly set the budget and the governor administer it as enacted. Voters can count on future governors not raiding special trust funds."

The case resulted from actions then-Gov. Easley took in 2001 and 2002. To balance the state budget, Easley shifted an extra \$80 million from the Highway Trust Fund to pay bills owed by North Carolina government's General Fund. That \$80 million was an addition to the \$170 million already scheduled for transfer out of the Highway Trust Fund.

Legislators agreed to shift an additional \$125 million from the Highway Trust Fund, but Easley never sought their permission or endorsement before making his \$80 million transfer.

Both the governor's actions and the General Assembly's decision drew fire from former state Transportation Secretary James Harrington and former Sen. William Goldston, D-Rockingham.

Key players in the creation of the Highway Trust Fund in 1989, Harrington and Goldston challenged the transfer...

The N.C. Supreme Court ruled 4-1 in December 2006 that Harrington and Goldston had legal standing to pursue their lawsuit.

In September 2009, the N.C. Court of Appeals ruled 2-1 against Easley. In the same ruling the appeals panel upheld legislators' right to make transfers out of the Highway Trust Fund.

North Carolina's highest court has seven members, so an even split is uncommon. Timmons-Goodson recused herself from the case because she had participated in the Appeals Court panel that addressed the suit during the dispute over legal standing for Harrington and Goldston.