

IN THE INDIANA SUPREME COURT  
CAUSE NO. 71S00 - 0606 - CV – 00204

STEVE BONNEY, ET. AL )  
 )  
-V- )  
 )  
INDIANA FINANCE AUTHORITY, ET AL. )

**BRIEF OF *AMICUS CURIAE***  
**WILLIAM N. STANT**

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A BRIEF STATEMENT OF THE INTEREST  
OF THE *AMICUS CURIAE*

William Stant is a resident of Brown County and a Plaintiff in Brown County Circuit Court in a case related to the instant case that also challenges some aspects of the Major Moves legislation on constitutional grounds. His Complaint is attached to his petition to file an amicus brief. The Brown County Defendants, Governor Mitchell Daniels *et al.*, filed for extensions of time in which to answer Stant's Brown County Complaint while simultaneously actively pursuing the litigation in St. Joseph's County which has lead to this expedited appeal. This has resulted in Stant's voice not being heard, yet the issues which he has sought to pursue are already before this court. They also moved to dismiss Stant's complaint in the event that the Supreme Court upholds the ruling that Bonney v. IFA is a public lawsuit, which would forever prevent Stant from being heard. His interests are aligned with, but are not identical to, those of Mr. Bonney. Stant would make two arguments not articulated by Bonney.

SUMMARY OF ARGUMENT

"Public Debt" and "State Debt" are not the same things in the Indiana Constitution. State Debt cannot be used for public works, and income from public works must be used to pay down the principle of the Public Debt. The Major Moves legislation is unconstitutional in that it seeks to use income from public works for something other than the retirement of public debt while there is outstanding public debt.

Moreover, the imposition of a \$1.8 billion dollar bond deprives all plaintiffs of access to courts and the due course of law, as it is patently obvious that no citizens of the State can challenge the constitutionality of this legislation if the bond is allowed to stand.

## ARGUMENT

### I. “Public Debt” Cannot Be The Same As “State Debt”

The Indiana Constitution contemplates three types of debt. "Public Debt" is referred to in Article 10, § 2, of the Indiana Constitution, "State Debt" is referred to in Article 10 § 5, and "Municipal Debt" referred to in Article 13, §1.

- "Public Debt" is linked to "public works."
- "State Debt" is linked to "casual deficits," military defense, and interest on the "State Debt."
- "Municipal Debt" is linked to municipal corporations.

There is no limit of any kind on "Public Debt," either in amount or purpose, but it is obvious the Framers intended "public works" to be funded with "Public Debt" because the two are linked in Article 10, § 2. Moreover, the language of the section reflects that the Framers assumed in 1850 that “public works” would be constructed by future residents of the State of Indiana. If the Framers did not contemplate that future residents of the State would build “public works,” there would be no reason to place the section in the State’s organic document, potentially for perpetual use.

"State Debt" is prohibited except for three specified purposes, but for those specific purposes it is unlimited as to amount. However, "State Debt" cannot be used to fund "public works" because "public works" are not one of the three stated purposes for which "State Debt" is allowed.

"Municipal Debt" is limited in amount, but when kept under that limited amount is unlimited as to purpose.

Since the future construction of "public works" was contemplated by the Framers of the Indiana Constitution, and since "public works" could historically [and can presently] only be constructed with the issuance and the assumption of debt, and since "State Debt" specifically cannot pay for "public works," "Public Debt" must therefore be comprised of non-"State Debt" debt which is used to fund "public works."

The two types of Constitutional debt --"State" and "Public" -- therefore cannot be the same thing. The linguistic structure of the Constitution and the nature of reality admit of no other logical conclusion.

Judge Scopelitis' implicit conclusion otherwise is wrong. It may be, as Judge Scopelitis says, that the "State Debt" referred to in Article 10, § 5, no longer exists. But the current "Public Debt" of Article 10, § 2, does indeed exist and was created to finance the construction of the presently existing public works of the State of Indiana. Such debt can be found, and found easily. It is, at least, all of the debt currently held by the IFA, and may well be all of the debt described by Mr. Bonney's counsel in their brief in this appeal.

As Stant alleged in Paragraph 23 of his Complaint [which is attached to his Petition for Permission to File an Amicus Brief,] "Pursuant to the terms of Article 10, § 2, of the Indiana Constitution, any funds received pursuant to the lease of the Indiana Toll Road must be used to pay the principal of such pre-existing debt."

It was very important to the Framers of the Indiana Constitution that the Public Works of the State bear the burden of the debt assumed in the construction of such public works. During the debates on Article 37, Mr. Maguire stated, "Unquestionably the proceeds of the State's interests in any of the public works, should be held sacred to the

extinguishment of the indebtedness created for their construction...” Debates of the Constitutional Convention of 1850, page 1836.

That is why Article 10, § 2, of the Indiana Constitution states that all the revenues derived from the net annual income of any of the public works belonging to the State,

. . shall be annually applied, under the direction of the General Assembly, to the payment of the principal of the Public Debt.

Any net income from the toll road in any one year is “the net annual income thereof,” and Stant therefore asserts his right under the holding of Embry v. O'Bannon, 798 N.E.2d 157, 159-60 (Ind. 2003), to challenge other uses of the public’s money in violation of the terms of the Indiana Constitution.

## II. The Lower Court’s Ruling in St. Joseph’s County Denied Plaintiffs Due Course of Law, in Violation of Article I, §12 of the Indiana Constitution.

The first clause of Article I, § 12, of the Indiana Constitution provides that the courts shall be open and that each plaintiff shall have the right to due course of law. It states,

All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.

The Indiana courts have interpreted this provision as being synonymous with the federal Due Process Clause. Indiana High School Athletic Association, Inc. v. Carlberg, 694 N.E.2d 222, 241 (Ind.1997). That means a plaintiff has a fundamental right to be heard on the merits in a meaningful manner. Mathews v. Eldridge, 424 U.S. 319, 333 (1976); accord Wakshlag v. Review Board of Indiana Employment Security Division, 413 N.E.2d 1078, 1082 (Ct. App. 1980).

By declaring this case to be a “Public Lawsuit” and using his discretion to set an astronomically high \$1.8 *billion* bond requirement, the lower court has effectively prevented any plaintiff from being heard on the merits of the important issue of whether Major Moves violates the Indiana Constitution. Such a result would violate the federal Due Process Clause.

Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Richards v. Jefferson Co., 517 U.S. 793, 804 (1996).

The Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." Logan v. Zimmerman Brush Co., 455 U.S. 422, 429-30 (1982).

Access to courts is guaranteed by the Due Process Clause, and state regulations and limitations should not be allowed to totally frustrate this access regardless of whether they serve legitimate state interests. Degen v. U.S., 517 U.S. 820, 828-29 (1996); Gittlemacker v. Prasse, 428 F.2d 1, 6 (3rd Cir. 1970); and DeWitt v. Pail, 366 F.2d 682, 686 (9th Cir. 1966).

If the lower court’s decision that this is a public lawsuit requiring a \$1.8 billion bond is allowed to stand, it will effectively place the legislation beyond challenge. No plaintiff or class of plaintiffs could surmount this hurdle to challenge the constitutionality of the Major Moves legislation. If such a precedent is established, all that the legislature has to do in the future to make their actions immune from challenge would be to make the scale of the legislation large enough.

Under the lower court's ruling that this is a public lawsuit, plaintiff Stant who filed a separate action in Brown County will never have his day in court because Ind. Code § 34-13-5-10(b) prohibits any lawsuit subsequent to the first. Because of the \$1.8 billion bond requirement, the plaintiffs in the first lawsuit (Bonney et al) will also have no day in court. The lower court's use of a very high standard for exemption from the bonding requirement -- that plaintiff must establish by clear evidence that plaintiff "is likely to succeed, there must be a true emergency, and the harm must be irreparable" (Findings of Fact and Conclusions of Law ¶ 168) sets a standard that no plaintiffs can meet, so plaintiffs will never have a day in court. The Major Moves legislation will be immune from judicial review.

The lower court ruling totally foreclosing access to the courts is inconsistent with the purpose behind the public lawsuit rule. As the lower court determined, the statute was designed to prevent long litigation delays, avoid the harassment of multiple suits, and eliminate "completely non-meritorius" litigation. (Findings, supra, ¶¶ 124, 125, 172). If the legislature had intended to prohibit public works from being challenged in court, they could have said so, and the statute could have been challenged under Article I, sec. 12. This impermissible end should not be accomplished indirectly.

### III. STANT'S COMPLAINT IS NOT A PUBLIC LAWSUIT

A Public Lawsuit is "any action in which the validity, location, wisdom, feasibility, extent, or character of construction, financing, or leasing of a public improvement by a municipal corporation is questioned directly or indirectly. . ." Ind. Code 34-6-2-124.

Stant is not challenging "a" public improvement by "a" municipal corporation, but is instead seeking to assert his rights as a taxpayer of the state under Embry. Id. That is

why he did not sue any municipality, and why his right to be heard should not be extinguished by upholding the lower court's implausible decision that this challenge to state-wide legislation is actually a lawsuit against a municipal corporation.

#### CONCLUSION

Stant does not contest the lease of the Toll Road, or any one of the dozens of construction projects that might flow from it, and therefore raises different issues than were raised in Bonney v. IFA. Stant is only objecting to the use to which the Legislature and the officers of the State intend to put the proceeds. As long as there is any outstanding Public Debt which has been created and assumed for the construction of Public Works of the State, income from those Public Works must be used first to retire the principle of such Public Debt. By its erroneous decision that Bonney is a public lawsuit against a municipal corporation and its imposition of a \$1.8 billion bond, the lower court threatens to deprive both Plaintiffs of due course of law in violation of the Indiana Constitution, and renders a potentially unconstitutional act of the government immune from judicial review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this 10<sup>th</sup> day of June, 2006, I have served a copy of the foregoing by overnight mail on the following persons, as taken from the Clerk of the Court's online docket, after emailing copies to an attorney of record for each party as reflected on the Clerk's online docket.

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