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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

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Tom Fredricks

v.

John McMillan, in his capacity as State Treasurer; Dr. Kathleen Baxter, in her capacity as State Comptroller; and Kelly Butler, in his capacity as State Finance Director

**Appeal from Montgomery Circuit Court
(CV-19-900579)**

PER CURIAM.

This appeal, taken from a judgment of the Montgomery Circuit Court and transferred to this court pursuant to Ala. Code 1975, § 12-2-7(6), concerns the constitutionality of

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portions of Ala. Acts 2019 (1st Special Session), Act No. 2019-2, known as "the Rebuild Alabama Act," under which certain moneys derived from state gasoline and diesel-fuel excise taxes are to be distributed to pay the principal of and the interest on bonds issued for the financing of improvements to the Mobile Ship Channel. Because we conclude that our legislature acted within its discretion to mandate the use of those moneys to defray the "cost of construction, reconstruction, [and] maintenance and repair of public highways" within the scope of Amendment No. 93 to the Alabama Constitution of 1901 (now Art. IV, § 111.06, Ala. Const. 1901 (Off. Recomp.)), we affirm the circuit court's judgment.

On March 5, 2019, Alabama Governor Kay Ivey issued a proclamation, in accordance with Article V, § 122, of the Alabama Constitution of 1901, summoning the Alabama Legislature into an extraordinary session beginning on March 6, 2019, to consider particularly designated subjects deemed by the governor to be "necessary ... for the safety and economic prosperity of the people of Alabama." The subjects included in the governor's proclamation encompassed, in pertinent part, legislation "to levy an additional excise tax

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on gasoline and diesel fuel"; "to provide for the distribution of th[o]se additional revenue streams for the sole purpose of improving and maintaining the transportation infrastructure of the state, its counties and municipalities, and the Alabama State Port Authority"; "to provide the Alabama Highway Finance Corporation with authority to borrow money and issue bonds for the purpose of improving the Alabama State Docks and the Mobile Bay ship channel"; and "to provide the State Treasurer authority to pay the principal and interest of bonds issued by the [Alabama Highway Finance Corporation] out of the revenues appropriated and pledged for such purpose."

During the ensuing extraordinary session, the Alabama Legislature passed two pertinent bills that became law on March 12, 2019. House Bill 3, enacted as Ala. Acts 2019 (1st Special Session), Act No. 2019-3, provided in § 1(a)(1) that the Alabama Highway Finance Corporation ("AHFC") would have the power "[t]o borrow money and issue its bonds in evidence thereof ... for the purpose of financing the widening and deepening of the Mobile Ship Channel" and related improvements; the Mobile Ship Channel was defined in § 1(d) of Act No. 2019-3 as "the existing ship channel having its

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northern terminus seven thousand (7,000) feet north of the mouth of the Mobile harbor, and its southern terminus approximately 6 nautical miles south of Fort Morgan, comprising approximately 31 nautical miles in length." House Bill 2, enacted as Act No. 2019-2 (i.e., the Rebuild Alabama Act), imposed (in § 6) an additional excise tax on "each net gallon of gasoline and diesel fuel" to be implemented in four phases: (a) six cents per gallon after August 31, 2019; (b) an additional two cents per gallon on October 1, 2020; (c) an additional two cents per gallon on October 1, 2021; and (d) "[b]eginning October 1, 2023, and on July 1 of every other year thereafter," a periodic increase or decrease of one cent per gallon dependent upon future changes in "the yearly average of the National Highway Construction Cost Index ... issued by the U.S. Federal Highway Administration" compared to the average for the period ending in December 2020. Under § 7(b) of the Rebuild Alabama Act, which has since been codified as Ala. Code 1975, § 40-17-371(b), "up to \$750,000 of the tax proceeds from the additional excise tax on gasoline and up to \$230,000 of the tax proceeds from the additional excise tax on diesel fuel" received each month is to be

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distributed to the AHFC "for the payment of the principal of and interest on bonds to be issued by it to finance improvements to the ship channel providing access to the facilities of the Alabama State Docks, to the extent necessary for such purpose."

The legislature further expressly stated as findings in the Rebuild Alabama Act that, "consistent with the constitutional mandate that navigable waterways are public highways, ... a portion of the gasoline and diesel fuel sold in this state is used for marine purposes to propel vessels on coastal and inland waterways of this state" and that "it is the policy of this state to use a portion of the funds derived from the additional excise tax levied by this act on each net gallon of gasoline and diesel fuel for the programs and activities of the Alabama State Port Authority." Act No. 2019-2, §§ 2(a) & 2(b). The "constitutional mandate" referred to by our legislature is currently set forth in Act I, § 24, of the Alabama Constitution of 1901: "That all navigable waters shall remain forever public highways, free to the citizens of the state and the United States, without tax, impost, or toll." That mandate, which has appeared in each of

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Alabama's state constitutions since Reconstruction,¹ is in strict accord with a Congressional mandate dating back to March 3, 1803, to the effect that "all navigable rivers within the territory of the United States, south of the state of Tennessee, shall be deemed to be and remain public highways," 2 Stat. ch. 27, § 17, at p. 235, and also appears in the subsequent act of Congress, enacted on March 2, 1819, permitting Alabama to become a state (3 Stat. ch. 47, § 6, p. 492).

In 1952, the people of Alabama ratified Amendment No. 93 to the Alabama Constitution of 1901 ("Amendment No. 93").² In pertinent part, Amendment No. 93 earmarked moneys derived from state fees, excises, and license taxes "relating to registration, operation, or use of vehicles upon the public highways" or to "fuels used for propelling such vehicles" to particular specified uses. The uses permitted by Amendment

¹See Ala. Const. 1868, Art. I, § 26; Ala. Const. 1875, Art. I, § 25.

²Amendment No. 354, adopted in 1975, did not alter the pertinent language of Amendment No. 93 as originally ratified; the 1975 amendment instead added other provisions concerning personalized special motor-vehicle license plates. See generally Ala. Const. 1901, Art. IV, § 111.06.

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No. 93 include the "cost of administering such laws, statutory refunds and adjustments allowed therein, cost of construction, reconstruction, maintenance and repair of public highways and bridges, costs of highway rights-of-way, payment of highway obligations, the cost of traffic regulation, and the expense of enforcing state traffic and motor vehicle laws" (emphasis added).

On April 3, 2019, less than one month after the Rebuild Alabama Act went into effect, taxpayer Tom Fredricks initiated a civil action in the Montgomery Circuit Court seeking, in pertinent part, a judgment declaring that the term "public highways" in Amendment No. 93 refers only to land-based public highways and an injunction preventing moneys derived from the Rebuild Alabama Act from being applied "to the port of Mobile or any other project bearing principal relation to Alabama waterways." Named as defendants in the action were State Treasurer John McMillan, State Comptroller Dr. Kathleen Baxter, and State Finance Director Kelly Butler. The defendants answered the complaint and denied that Fredricks was entitled to the relief sought. The parties thereafter expressly stipulated that the Rebuild Alabama Act "provides

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for an additional tax on gasoline and diesel fuel" and that "Mobile Bay and the ship channel providing access to the Alabama State Docks, referred to in Section 7(b) of the [Rebuild Alabama Act], are navigable waters."

In October 2019, the defendants filed a motion for a summary judgment in their favor on all claims asserted by Fredricks, arguing that the pertinent language of Amendment No. 93, a portion of the Alabama Constitution of 1901, should be construed in pari materia with § 24, another portion of the same constitution, and in a manner consistent with the validity of the Rebuild Alabama Act. Fredricks filed a cross-motion for a summary judgment in his favor in November 2019, advocating for adoption of the "standard common definition of the word highway as being a word exclusively denoting a land based way." The circuit court, after a hearing, denied Fredricks's summary-judgment motion and instead entered a summary judgment in favor of the defendants. Fredricks timely appealed from that judgment, and that appeal, as we have stated, was transferred to this court pursuant to Ala. Code 1975, § 12-2-7(6), a statute that authorizes our supreme court

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to transfer certain civil cases within that court's appellate jurisdiction to this court.³

A summary judgment, such as that entered by the circuit court in this case, "is appropriate upon a showing that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law." Carpenter v. Davis, 688 So. 2d 256, 258 (Ala. 1997) (citing Rule 56, Ala. R. Civ. P.). As was true in Carpenter, "[t]he facts in this case are undisputed," and we will thus "review the [circuit] court's application of the law to those facts to determine whether the [defendants] were entitled to a judgment as a matter of law." Id.

In his brief, Fredricks aptly observes that "[t]he only issue at stake is what does the word 'highway' or 'public

³Subsection a. of § 12-2-7(6) excludes from the class of transferrable appeals those civil cases that our supreme court determines "present[] a substantial question of federal or state constitutional law." Pursuant to Ala. Code 1975, § 12-3-16, this court is bound by decisions of our supreme court, and we may infer that that court has determined that no substantial question of state constitutional law is present in this case. Cf. Young v. Ledford, 37 So. 3d 832, 832 n.1 (Ala. Civ. App. 2009) (similarly inferring determination that transferred appeal did not involve resolution of "'novel legal question'" having "'significant statewide impact,'" which, under § 12-2-7(6)b., would have precluded that transfer).

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highway' in [Amendment No. 93] refer to," and he asks whether the "plain meaning" of either of those terms correctly encompasses Alabama's navigable waterways. Fredricks then cites as authoritative a portion of a 1953 treatise tracing the etymology of the English word "highway" as having descended from the concept of Roman roads that were formed by throwing dirt from side ditches into a raised central location and observing that such raised roads were under royal protection and open to public travel as compared to "byways," which were private (1 Albert C. Rose, Public Roads of the Past, p. 8 (1953)),⁴ and proceeds therefrom to the position that "[t]he seafloor of Mobile Bay ... is not a high way." The defendants, for their part, assert that the term "highway" is commonly interpreted as a generic reference to all kinds of public ways (citing, among other cases, Sexton v. State, 239 Ala. 662, 663, 196 So. 746, 746 (1940)), yet thereafter, in their zeal to uphold the summary judgment under review, rely heavily upon the placement of the word "public" before "highway" and depart from Sexton's clear expression that the

⁴The pertinent portion of the treatise appears in the record on appeal.

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term "public highway" is "'tautological ..., since all highways are necessarily public.'" Id. (quoting State ex rel. McMaster v. District Ct. for Broadwater Cnty., 80 Mont. 228, 231, 260 P. 134, 135 (1927)).

Regardless of what the terms "highway" and "public highway" might mean in other contexts, the clear intent of the drafters of the Alabama Constitution of 1901 was to place Alabama navigable waters in the category of "public highways" that Alabama's citizenry is free to traverse, even if the underlying root term "highway" may properly trace its roots to the road-building practices of Roman Britannia. Similarly, the drafters of Amendment No. 93, some 50 years later, acted in recognition of the existing definition of "public highways" and included no provisions to exclude navigable waterways from that definition. "Each section of the Constitution must necessarily be considered in pari materia with all other sections." Jefferson Cnty. v. Braswell, 407 So. 2d 115, 119 (Ala. 1981) (emphasis added).

Our interpretation of the term "public highways" to include navigable waterways, in accordance with § 24 of the Alabama Constitution of 1901, is by no means a novel or a

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strained one. The former Alabama Court of Appeals confronted a similar question in Pappenburg v. State, 10 Ala. App. 224, 65 So. 418 (1914), in which a defendant was convicted of having violated a statute that proscribed "conveying or transporting over or along a public street or highway prohibited liquors[] for another" because he had transported the liquors over the Tennessee River, a navigable waterway. 10 Ala. App. at 226, 65 So. at 419. The Court of Appeals opined that "the word 'highway' is a generic name used to denote 'every thoroughfare which is used by the public, whether it be a carriageway, a horseway, a footway, or a navigable river,'" id. (quoting 3 James Kent, Commentaries on American Law, p. 548 (11th ed. 1867)), and cited both § 24 of the Alabama Constitution of 1901 and the 1819 act of Congress as support for the proposition that "the generic term 'highways' as including navigable streams has been the declared law of this state" and as "the correct general construction or definition to be given to the term in this state in both criminal and civil cases." 10 Ala. App. at 227-28, 65 So. at 419. The Court of Appeals upheld the defendant's conviction, holding that the statutory term

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"highway" was to be interpreted as having been used in its "generally recognized meaning" so as to include "a navigable river" such as the Tennessee River. 10 Ala. App. at 230, 65 So. at 420. See also Walter v. City of Gulf Shores, 829 So. 2d 181, 185 (Ala. Crim. App. 2001) (holding that municipality could regulate business activity in navigable waters within its police jurisdiction because "the navigable waters within the police jurisdiction ... are a public highway, not private property"), aff'd, 829 So. 2d 186 (Ala. 2002).

The general principle applies that courts of this state seek to sustain, rather than strike down, enactments, such as the Rebuild Alabama Act, of our legislature, which acts as a coordinate department of Alabama's government. See Ex parte Boyd, 796 So. 2d 1092, 1094 (Ala. 2001). As we have stated, Amendment No. 93 allows the expenditure of gasoline and diesel-fuel excise taxes levied by the State to defray the cost of "construction," "reconstruction," "maintenance" and "repair" of "public highways" -- a term that has a generally accepted meaning, as Pappenburg makes clear, that includes any thoroughfare used by the public, whether on land or on water. The Rebuild Alabama Act allocates certain excise-tax moneys to

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defray financial obligations incurred by the AHFC to finance improvements to the Mobile Ship Channel, a body of water that was stipulated by the parties as navigable. We thus conclude that the allocation in the Rebuild Alabama Act of excise-tax moneys collected by the State to offset monetary obligations incurred by AHFC, an instrumentality of the State, in order to reconstruct, maintain, or repair the Mobile Ship Channel is a constitutional exercise of the legislature's power under Amendment No. 93, and we affirm the summary judgment in favor of the defendants.

AFFIRMED.

Thompson, P.J., and Moore, Donaldson, and Hanson, JJ., concur.

Edwards, J., concurs in the result, without writing.