IN THE
INDIANA COURT OF APPEALS
CAUSE NO. 24A-PL-00418

Perry County, Indiana; The Board of Commissioners of the County of Perry (Indiana); Randy Cole; Randy Kleaving; Rebecca Thorn	)	Appeal from the Perry Circuit Court
	)	Trial Court Case No.: 62C01-2401-PL-31
Appellants/Defendants,	)	
v.	)	The Honorable Justin B. Mills, Special Judge.
Keith D. Huck,	)	
Appellee/Plaintiff.	)	

APPELLEE'S PETITION TO TRANSFER

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QUESTION PRESENTED ON TRANSFER[1]

In a case of first impression, did the Court misinterpret the applicable statutory framework when it failed to recognize that an "elected official" is neither a "full-time employee" nor a "part-time employee," but rather is simply an "employee," and thus cannot be excluded from the group health insurance provided and paid in part by the county?

[1] As used herein, "Councilman Huck" = Appellee, Keith D. Huck; "Common Council" = the Common Council of Perry County, Indiana; "Court" = Indiana Court of Appeals; "Opinion" = the April 29, 2024, Published Opinion from which transfer is sought; "Commissioners" = Appellants, The Board of Commissioners of the County of Perry (Indiana); and "County" = Perry County (Indiana); "Handbook" = Perry County Personnel Policies Handbook (Appellee's Addend. pp. 14-25).

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BACKGROUND AND PRIOR TREATMENT OF ISSUE ON TRANSFER

The County is an employer that provides optional group health insurance coverage for some of its employees, retired employees, and dependent family members. (Appellee's App. Vol. 2, pp. 3-4, ¶ 7.) Prior to January 1, 2024, Councilman Huck, a duly elected member of the Council, received said group health insurance provided and paid in part by the County.[2] (Appellee's App. Vol. 2, pp. 4-5, ¶ 11.) However, the Commissioners, at a meeting on June 5, 2023, without its legal counsel present and without reference to any federal, state or local laws of any kind, including the Affordable Care Act, decided in a 2-1 vote that Councilman Huck was not eligible for the County's group health insurance because he was a "part time elected official." (Appellants' App. Vol. 2, pp. 34, 38.) Beginning January 1, 2024, the County excluded Councilman Huck from said group health insurance, leaving him uninsured.[3] (Appellants' App. Vo. 2, pp. 30-31.)

To continue the group health insurance that was provided and paid in part by the County, Councilman Huck filed suit against the County and its Commissioners on January 18, 2024, through his *Verified Complaint for Declaratory Judgment and Injunctive Relief* and his *Verified Motion for Preliminary Injunction*. (Appellants' App., Vol. 2, pp. 12-20.) On January 25, 2024, the trial court scheduled the preliminary injunction hearing for February 9, 2024. (Appellants App. Vol. 2, p. 5.) The Commissioners filed their *Opposition to the Motion for Preliminary Injunction* on February 8, 2024. (Appellants' App. Vol. 2, p. 21.) The hearing proceeded as scheduled on

[2] At all times, Councilman Huck's spouse also received the group health insurance provided and paid in part by the County.

[3] The Commissioners first advised Councilman Huck that such coverage stopped by written notice dated January 25, 2024; this same notice advised Councilman Huck that COBRA benefits, which would have to be paid solely by Councilman Huck, would cost: Employee Only $1,671.99; Employee + Spouse $2,527.05. (Appellants' App. Vol. 2, p. 44.)

February 9, 2024; upon conclusion of argument, the trial court granted the preliminary injunction from the bench. (Appellants' App., Vol. 2, p. 6.) Among other things, the trial court stated:

> The thing that I think is important, and I know—I believe I know what the commissioners are looking at and talking about in just reading the materials that were filed. And looking at the reasoning of how many hours a council meets or what the salary is compared to what benefits are paid.
>
> I understand all that and the fact that I think the commissioners are trying to pigeonhole these elected officials into part-time employees, but frankly, there is no definition that says an elected official is a part-time employee, and I believe that to be true.
>
> I think there's a lot of work that goes on behind the scenes, day to day, night-in, night-out, that isn't in a meeting or isn't documented in minutes somewhere, that elected officials do specifically in the commissioner's role or the council role. I do think that there is irreparable harm in this situation. I think that we're talking about an individual's access to health care.

(Transcript Vol. 2, pp. 15-16.) The written *Order on Plaintiff's Verified Motion for Preliminary Injunction* was entered by the trial court on February 16, 2024. (Appellants' App., Vol. 2, p. 7.)

The Commissioners timely filed their Notice of Appeal; they also sought (unopposed by Councilman Huck) and were granted an expedited briefing schedule. (CCS entries, 02/21/2024 and 02/23/2024.) The parties filed all briefs, appendices and addenda consistent with the Court's expedited schedule. (CCS entries, 03/26/2024, 03/27/2024, 04/17/2024 and 04/24/2024.)

On April 29, 2024, the Court entered the Opinion, which reversed and remanded the trial court's entry of the preliminary injunction in favor of Councilman Huck. (*See generally*, Opinion.) At issue herein, the Court found that Councilman Huck, as an "elected official," ***was*** an "employee" under I.C. § 5-10-8-1(1)(A), but then determined that he ***was not*** a "full-time employee" under I.C. § 5-10-8-2.6(b), thus holding that the Commissioners had the authority to exclude Councilman Huck from the group health insurance coverage provided and paid in part by the County. (Opinion, pp. 5-6.)

This Petition timely follows.

ARGUMENT

I.

Undecided Question of Law

The question of law is whether local government units can exclude some elected officials from group insurance programs on the basis that they are "part-time employees", or, conversely, whether elected officials do not legally fall into either "full-time" or "part-time" categories and are simply "employees" for purposes of program eligibility.

Commissioners correctly state that "[t]here are almost 850 different cities, towns, and counties in this State." (*See* Reply Brief of Appellants, p. 9.) The interpretation of the statutory framework at issue will affect each such local government and thousands of elected local officials across the State of Indiana.

The General Assembly has never created such a thing as a "part-time elected official", but that is what the Opinion does, and it will have far-reaching implications.

As the interpretation of the statute at issue is one of first impression, the Court undisputably decided an important question of law (and case of great public importance) that has not been decided by the Supreme Court. It should be. Transfer should be granted.

II.

Significant Departure from Law

A. The statutes are clear and unambiguous.

When a statute is clear and unambiguous on its face, no room exists for statutory construction. *Service Steel Warehouse Co., L.P. v. United States Steel Corp.*, 182 N.E.3d 840, 843 (Ind. 2022). This is accepted law from which the Court so significantly departed by creating an ambiguity where none exists, thus requiring the exercise of Supreme Court jurisdiction.

The error in the Court's opinion begins at ¶ 7, where, after correctly finding that "as an elected official, Huck is an employee" under I.C. §§ 5-10-8-1 and 5-10-8-2.6, it continues, "[b]ut that is not the end of the inquiry." (Opinion, p. 4.) To the contrary, it is indeed the end of the inquiry. There is no basis to hold that elected officials are subject to categorization as *either* "part-time" *or* "full-time". They are neither for purposes of this statutory framework; they are just simply employees.

The unambiguous language of I.C. § 5-10-8-1(1)(A) reads: "Employee means an elected or appointed officer or official***, or*** a full-time employee." (Emphasis added.) The emphasis is intentionally placed on ***", or***" because the punctuation mark and conjunction together unambiguously create five separate classes of an "employee"—four to the left of the comma and one to the right. To the left of the comma are 1) elected officers, 2) elected officials, 3) appointed officers and 4) appointed officials; the fifth separate class to the right of the comma is full-time employee. Necessarily then, an "elected official" for purposes of defining "employee" under the statute, is not a "full-time employee"—an elected official is simply an "employee."

Further, the provision in I.C. § 5-10-8-1(1)(C) provides that the term "employee" also means "for a local unit public employer, a full-time or part-time employee or a person who provides personal services to the unit under contract during the contract period," which identifies three classes of employees, namely "part-time employees", "full-time employees" and "contract" (a distinction from at-will) employees. None of these encompass elected officials, which have already been defined as simply "employees" under sub-paragraph (1)(A) in the very same subsection.

Indeed, "[t]o get at the thought or meaning expressed in a statute . . . the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which

the framers of the instrument have placed them." *FLM, LLC v. Cincinnati Ins. Co.*, 973 N.E.2d 1167, 1176 (Ind. Ct. App. 2012), (citations omitted), *trans. denied*. Further, in construing a phrase, it is proper and pertinent to examine things such as punctuation (*City of Indianapolis v. Ingram*, 377 N.E.2d 877, 884 (Ind. Ct. App. 1978)), to which courts must give due regard. *Lake Holiday Conservancy v. Davison*, 808 N.E.2d 119, 123 (Ind. Ct. App. 2004).

B. The Court did not understand the issue on appeal.

The seed from which the Court's creation of a statutory ambiguity apparently sprouted comes earlier, in the second paragraph of the Opinion, when the Court incorrectly characterized Councilman Huck's "theory" in support of the preliminary injunction:

> Huck filed a petition for a preliminary injunction to require the Board to provide him with health insurance coverage ***on the theory that, as an elected county official, he is necessarily a full-time employee, regardless of his actual hours worked.***

(Opinion, p. 2; emphasis added.) The Court's misunderstanding continued when in incorrectly identified the issue on appeal: "whether elected county officials are per se full-time employees such that counties must provide them with health insurance coverage." (*Id*.)

Councilman Huck has never claimed to be a full-time employee, but he does deny being a part-time employee, and both are true. His theory in support of the preliminary injunction—and what is unambiguously the plain language of the statute—is that as an elected official he is simply an "employee," and thus he cannot be excluded from the group health insurance provided and paid in party by the County under I.C. § 5-10-8-2.6(b). He does not need to be categorized as a "full-time employee", but he cannot be categorized as a "part-time employee".

Thus, the issue on appeal was whether Councilman Huck was an employee under the statute; when the Court answered that question in the affirmative, the Court should have determined that the Commissioners could not exclude Councilman Huck from the group health

insurance that the County provides and pays in part for all other County employees including the County Treasurer, the County Auditor, and the County Assessor—elected officials of the County who were ***not*** excluded from the health insurance coverage. (Appellants' App. Vol. 2, pp. 37-38.)

C. The Court failed to apply important rules of statutory construction and misapplied others.

1. The Court was bound by a statutory definition but impermissibly enlarged it.

The primary goal in statutory interpretation is to determine and give effect to the intent of the legislature. *In re S.H.*, 984 N.E.2d 630, 634 (Ind. 2013). The best evidence of legislative intent is the statute's language, so courts begin their analysis with those words. *Id*. at 635. When a statute's language allows only one meaning, the court accepts what it says ***without enlarging or restricting its plain and obvious meaning***. *Id*.; *Suggs v. State*, 51 N.E.3d 1190, 1193 (Ind. 2016). "In other words, when the meaning of the words is plain on paper, we need not resort to other rules of statutory construction to divine intent." *Jackson v. State*, 50 N.E.3d 767, 772 (Ind. 2016).

Moreover, where, as here, the legislature has defined a word used in a statute ("employee" means "elected official"), courts are bound by that definition "even though it conflicts with the common meaning of the word." *Consolidation Coal Co. v. Indiana Dep't of State Revenue*, 583 N.E.2d 1199, 1201 (Ind. 1991), *citing Spaulding v. International Bakers Serv.*, 550 N.E.2d 307, 309 (Ind. 1990).

As explained above, for purposes of this statutory scheme, "employee" means an "elected official" ***or*** a "full-time employee." However, the Court unnecessarily and improperly enlarged the meaning of an "elected official" by attempting to determine whether an "elected official" is ***also*** a "full-time employee" or a "part-time employee." (Opinion, pp. 4-5.) That determination is irrelevant and not required by the plain language of the statute. Contrary to the Opinion, the statute

does indeed "exempt" elected officials from the consideration of full-time or part-time employees by stating that "employee" means "an elected official." (*Id*.)

2. The Court improperly looked to federal law that was not identical to the statutes at issue in an attempt to categorize some elected officials as "part-time employees".

The Opinion states: "Absent clear direction from our General Assembly to the contrary, the definition of 'full-time' and 'part-time' employees here is controlled by federal law," and then goes on to use definitions from the Affordable Care Act ("ACA") and the IRS. (Opinion, p. 5, citing an online publication by the IRS.)

However, its reasoning here—as in its creation of an ambiguity and enlargement of a statutory definition—is nonetheless flawed and contrary to settled law. It is true that "[w]hen interpreting an Indiana statute for the first time, it is appropriate to look to the decisions of other jurisdictions that construe ***identical*** statutory provisions." *Fratus v. Marion Community Schools Bd. of Trustees*, 749 N.E.2d 40, 44-5 (Ind. 2001), *quoting Bd. Of Comm'rs of County of Knox v. Wyant*, 672 N.E.2d 77, 79-80 (Ind.Ct.App. 1996). However—and of utmost importance—the ACA and the IRS do not contain ***identical*** provisions to the statute at issue, nor are they the federal counterpart of the statute. *See Fratus* at 44-5 (the National Labor Relations Act is the federal counterpart to Indiana's Certified Educational Employee Bargaining Act*); see also Indiana Civ. Rights Comm'n v. County Line Park*, 738 N.E.2d 1044, 1048 (Ind. 2000) (relying on federal case authority interpreting the Federal Fair Housing Act as a guide to interpreting Indiana's Fair Housing Act). The Court's desire to unnecessarily sort out what "part time" and "full time" mean led it to apply inapplicable federal law and thus embrace a definition of "employee" that nullifies a legislative requirement, i.e., that the definition of "employee" include an "elected official". The Supreme Court "will not embrace a definition that nullifies a legislative requirement." *Town of*

Brownsburg v. Fight Against Brownsburg Annexation, 124 N.E.3d 597, 605 (Ind. 2019), *citing ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1199 (Ind. 2016).

D. The unambiguous statutory definition treating elected officials as employees but not subdividing them into "part-time" and "full-time" categories is consistent with other legal treatment—and its application at the local level—distinguishing elected officials from other types of employees.

1. Beyond the fact that the Court had no reason to find a distinction between part-time and full-time elected officials under these statutes, there simply is no legitimate method of doing so.

No elected official—including Councilman Huck—is required to keep record of hours worked, which contradicts any intent or understanding by the General Assembly that elected officials can be divided into part-time versus full-time classifications because it removes the method for doing so. Ind. Code § 36-2-5-13(b) states in pertinent part that "An elected county officer is not required to report hours worked and may not be compensated based on the number of hours worked." This section, importantly, governs how county elected officials are compensated, not only by salary but also by employee benefits. Consistent with this provision, the Handbook likewise provides that elected officials are excepted from the requirement to report hours worked. (Appellee's Addend., p. 21, § 3.9.)

The Court missed the import of Councilman Huck's discussion of the Handbook, which was not offered for the proposition that it supersedes state statute. (Opinion, p. 6.) Rather, there are at least ten important points within the Handbook on which the County itself distinguishes "employees" who are at-will, hired, and either "part-time" or "full-time", from those who are "elected officials" and thus a separate category of employees with no reference to or distinction based on their hours or how much or how long they work:

- "Elected officials…are excluded from this Personnel Policies Handbook, except where noted" (Appellee's Addend., p. 16, Handbook § 1.2);

- "the County shall be defined to mean…the Perry County Council, the elected officials of Perry County…" (Appellee's Addend., p. 16, Handbook § 1.3);

- there are four (4) "Employment Categories," "Regular Full-time," "Part-time," "Temporary," and "Grant," none of which include "elected officials" (Appellee's Addend., p. 17, Handbook § 2.8);

- "a County employee is considered to have resigned from employment with the County if the employee assumes elected executive office of the County or becomes an elected member of the County's legislative or fiscal body" (Appellee's Addend., p. 19, Handbook § 2.20);

- If a full-time employee is elected to a Perry County elective office . . . [and] returns to a non-elective full-time position his/her time in elective office shall count as years of service for the purpose of determining the amount of eligible vacation time or other benefits based on years of service with the County." [Appellee's Addend., p. 19, § Handbook § 2.21);

- "Perry County has adopted the Factor Evaluation System (FES) of job classification for all County non-elected positions . . . All County positions, except those of elected officials, are systematically grouped into job classes based on their fundamental similarities." (Appellee's Addend., p. 20, Handbook § 3.5);

- "The wages of an elected official cannot be deducted, as set by law" (Appellee's Addend., p. 21, Handbook § 3.7D);

- for Indiana Timekeeping Requirements, "IC 5-11-9-4 requires that public sector employees (except elected officials) maintain records showing which hours were worked each day by officers and employees" (Appellee's Addend., p. 21, Handbook § 3.9);

- for Overtime Compensation and Compensatory Time, "Employees holding **EXCLUDED** positions include elected officials…These employees are not covered by the FLSA, and are not eligible for or entitled to receive overtime compensation or compensatory time off," and that "Excluded employees except for elected officials must maintain time keeping records to satisfy Indiana statutes governing public employers. Elected Official positions within the County are considered Excluded and are not entitled to and shall not receive FLSA overtime compensation or FLSA compensatory time off" (Appellee's Addend., p. 23; Handbook § 3.17) (emphasis in original);

- for purposes of COBRA, qualifying events for the employee and dependents were only available if (i) "his/her position is lost due to reduction in hours," or (ii) "termination of employment," (iii) "death of the employee," and (iv) "divorce or legal separation" (Appellee's Addend., p. 25, Handbook § 4.14); and

- "INPRS's Employer Financed Pension requires ten (10) years of service to become vested" whereas "Elected officials are vested after eight (8) years of service" (Appellee's Addend., p. 25, Handbook § 4.15).

2. Even though it is a moot question, the Court should not have found Councilman Huck was a "part-time elected official" given the evidence and the inferences drawn by the trial court.

Notwithstanding the statute exempting elected officials from reporting hours worked and prohibiting hours worked as a basis for pay, the Commissioners proffered and the Court relied on exactly this—a purported "report" of hours worked—to support the conclusion that Councilman Huck is a "part time elected official". (*See, e.g.*, Appellants' Brief, p. 12; and Opinion, p. 6.) This is despite the fact none of the information was based on any type of hourly work reporting software or system but rather was merely an inference based on the number and possible duration of Council meetings during the year 2023. (*Id*., citing Appellants' App. Vol. 2, pp. 50-134.)[4] There has been no argument and no evidence that Councilman Huck's work in that position was limited to going to meetings, that he never received or sent correspondence, never prepared for meetings, never conducted his own review or investigation or evaluation of matters that were (or would be) before the Council, never traveled for his position or performed any other personal service toward his job

[4] In fact, the Commissioners and the Court failed to acknowledge how Councilman Huck was any less an "elected official" and thus an "employee" under the statutory framework, as was, e.g., the County Treasurer, the County Auditor, and the County Assessor—all elected County officials that were not excluded from the group health insurance provided and paid in part by the County. (Appellants' App. Vol. 2, p. 37-8.) Just as there was no analysis at the Commissioners' June 5, 2023, meeting as to the meetings attended or hours clocked by Councilman Huck, there were none for the County's Treasurer, Auditor and Assessor. (*Id*.) Notably, there also was no discussion of any laws—federal, state or local—relied upon by the Commissioners to create a new class of elected officials ("part-time elected officials) or the basis by which to exclude on include an elected official. (*Id*.) Likewise, the County Attorney was not present at the meeting and there was no reference to any legal advice received by the Commission on this topic prior to the meeting. (*Id*.) The only evidence of an alleged analysis of whether an elected official is a full-time or part-time employee was created after Councilman Huck initiated this lawsuit, namely in the affidavit of the County's "Payroll/HR Administrator," who clearly was not a decision-maker at the June 5, 2023, meeting. (Appellants' App. Vol. 2, pp. 30-32.)

as an elected official. Simply put, the trial court was appropriately observant as to the role and work of elected officials as set forth above, including the inferences that "there's a lot of work that goes on behind the scenes, day to day, night-in, night-out, that isn't in a meeting or isn't documented in minutes somewhere, that elected officials do specifically in the commissioner's role or the council role." (Transcript Vol. 2, pp. 15-16.)

Frankly, the General Assembly—for purposes of this statute—took away the Commissioners' ability to pigeonhole any elected or appointed official as a full-time or part-time employee. And doing so makes sense—it necessarily treats elected officials in all Indiana jurisdictions exactly the same for this statutory framework, and it prevents local politics or bias from creeping-into the decision of which elected officials are full-time or part-time employees, e.g., without the definition, a local jurisdiction's executive could otherwise exclude a political adversary from group health insurance provided and paid in part by the local unit.

In sum, there simply is no legitimate method of dividing elected officials into part-time versus full-time classifications, and no reason to do so. And there are good reasons not to do so.

III.

The Requirements for Preliminary Injunction were Satisfied.

The Opinion makes no mention of the remaining factors required for a preliminary injunction and simply stopped with its conclusion that Councilman Huck did not have a reasonable likelihood of success on the merits of his claim. (Opinion, p. 6.) Councilman Huck thus relies on the record and the argument presented to the Court.

CONCLUSION

For the foregoing reasons, Councilman Huck respectfully prays that this court will accept transfer of this matter, vacate the Opinion, and affirm the trial court's grant of preliminary injunction.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Pursuant to Appellate Rule 44(E), I certify that this Appellee's Petition to Transfer contains no more than 4,200 words, excluding the items listed in Appellate Rule 44(C), as counted by Microsoft Word (Office 365), which was used to prepare the Petition.

/s/ Dirck H. Stahl
Dirck H. Stahl

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 13th day of June, 2024, the foregoing was filed electronically using the Court's IEFS system, and service was made upon the following counsel of record via that system pursuant to Ind. Appellate Rule 68:

Anthony W. Overholt

Maggie L. Smith

Alexander P. Will

/s/ Dirck H. Stahl
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