

ORIGINAL

IN THE SUPREME COURT OF OHIO

09-0933

JULIE VOLBERS-KLARICH, :
 :
 Plaintiff/Appellants : **On Appeal from the Butler**
 : **County Court of Appeals**
 : **Twelfth District**
 v. :
 :
 Middletown Management, Inc., et al. : **Court of Appeals Case No. CA2008-07-160**
 :
 Defendants/Appellants :

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT JULIE VOLBERS-KLARICH**

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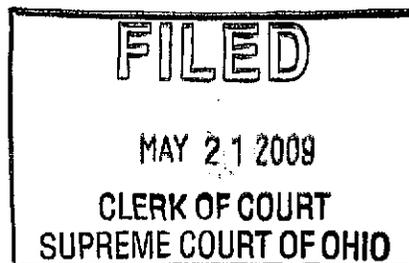


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EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This case is of great public or great general interest for two important reasons which affect all of the citizens of the State of Ohio and its various counties and municipalities. First, the Appellate Court's Decision requiring that any action regarding the imposition of taxes, even non-existent taxes, must be brought solely against the county and municipal taxing entities in whose name the non-existent taxes were collected places an unfair and undue burden on these counties and municipalities. The Appellate Court's Decision would not only require these governmental entities to reimburse plaintiffs for non-existent taxes collected in their name, thereby unfairly reducing their coffers to the detriment of their citizens, but would also require these counties and municipalities to expend legal fees to their citizen's detriment in order to defend themselves and to seek damages and reimbursement from the parties who fraudulently collected taxes in their name. The financial burden placed on the governmental entities as set forth above drains the resources of these entities and therefore affects all citizens living within their borders. For this reason, this case is of great public and general interest and this Court should accept jurisdiction.

In addition, the Appellate Court's decision prevents consumers throughout the state from bringing OSCPA and fraud claims against fraudulent vendors who take money from unsuspecting consumers under the guise of a non-existent tax. The purpose of Ohio Consumer's Sales and Practices Act is to protect consumers from deceptive acts and practices. It cannot be argued that stealing money from consumers by charging them a non-existent tax is not both fraudulent and a violation of the OSCPA. The Appellate Court's decision prohibiting such actions against unscrupulous vendors who charge consumers for non-existent taxes is contrary to the purpose of the

OSCPA and leaves the citizens of this state unprotected against fraudulent vendors so long as these vendors take money from innocent consumers under the guise of a non-existent tax, rather than another con or ruse. For this reason as well, this case is of great public and general interest and this Court should accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellant, Julie Volbers-Klarich (“Volbers-Klarich”), and her three children stayed at the Hampton Inn in Fairfield, Ohio on or about August 2002. This Hampton Inn in Fairfield, Ohio is owned by Middletown Innkeepers, Inc. and is managed by Middletown Management, Inc. (collectively “Defendants-Appellees”). Volbers-Klarich paid Defendants-Appellees the nightly rate for her room along with, what she thought, were three lodging taxes. Volbers-Klarich paid a State sales tax, a Butler County excise tax, and what was supposedly a Fairfield municipal excise tax. While the Ohio sales tax was legitimate, the supposed Fairfield municipal excise tax and Butler County tax did not actually exist. Defendants-Appellees collected money from Volbers-Klarich under the guise of being a required excise tax and then kept the monies from this deception.

Unfortunately, Volbers-Klarich was just one of Defendants-Appellees many victims. Beginning in 1999, Defendants-Appellees began this scam on travelers and guests who stayed at the Hampton Inn owned and operated by them in Fairfield, Ohio. Between 1999 and September 30, 2003, the only tax on a hotel room in Fairfield was a State sales tax. However, during this time, Defendants-Appellees also charged their hotel patrons a purported county and municipality excise ‘tax.’ Once the county excise tax became effective on October 1, 2003, Defendants-Appellees continued to charge the fictitious Fairfield excise ‘tax.’ Defendants-Appellees had complete knowledge no such ‘taxes’ existed for their patrons. Yet, Defendants-Appellees charged it to their

patrons, collecting the money for themselves. For more than seven years, Defendants-Appellees scammed and defrauded unknowing travelers who stayed at their hotel by charging them with fake and nonexistent 'taxes.'

On April 4, 2007, Volbers-Klarich filed a class-action complaint in the Trial Court on behalf of herself and all others similarly situated who had stayed at Defendants-Appellees' Hampton Inn hotel and had been improperly and fraudulently charged for non-existent taxes. Volbers-Klarich filed an Amended Complaint on August 2, 2007. On August 21, 2007, Defendants-Appellees filed a Motion to Dismiss Volbers-Klarich's Amended Complaint pursuant to Civil Rule 12(B)(6) for allegedly failing to state a claim upon which relief can be granted. Defendants-Appellees Motion to Dismiss was based on the incorrect allegation that Volbers-Klarich's claims against Defendants-Appellees for improper collection of taxes cannot be brought against Defendants-Appellees but instead must be brought against the taxing entities, Butler County and the City of Fairfield. Volbers-Klarich filed a response to Defendants-Appellees' Motion to Dismiss to which Defendants-Appellees filed a reply. Oral Argument was held on October 31, 2007.

On June 12, 2008, the Trial Court filed its Decision and Entry granting Defendants-Appellees' Motion to Dismiss incorrectly holding that Volbers-Klarich's improper tax collection claim cannot be properly brought against Defendants-Appellees but instead must be brought against the taxing entities, Butler County and the City of Fairfield. In the Trial Court's Decision, the Trial Court also incorrectly held that Volbers-Klarich's fraud claim should be dismissed due to alleged lack of particularity even though this issue was not even argued in Defendants-Appellees' Motion to Dismiss.

Subsequently, Volbers-Klarich appealed the Trial Court's decision to the Twelfth District

Court of Appeals, which affirmed the Trial Court's decision on April 6, 2009. Volbers-Klarich is now filing a notice of appeal and this memorandum in support of jurisdiction with this Court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

I. Appellant Volbers-Klarich's Proposition of Law No. I.: When a Company Collects Money under the Guise of a "Tax", While Knowing No Such Tax Exists, the Injured Party May Bring Claims Directly Against That Company Rather than the Governing Entity, the Company Claims Imposed the "Tax".

In confirming the Trial Court's Decision, the Appellate Court held that Volbers-Klarich's claims against Defendants-Appellees were properly dismissed because Volbers-Klarich cannot maintain a direct action against Defendants-Appellees, but instead must bring an action against the taxing entities. The Appellate Court relied heavily on *Parker v. Giant Eagle*, Seventh Dist. No. 01 C.A. 174, 2002-Ohio-5212 in affirming the Trial Court's Decision. However, *Parker* deals with a different issue and the Appellate Court misread both the relevant law and *Parker*. In *Parker*, a grocer improperly calculated the State sales tax and then charged the wrong amount of this tax. *Parker*, supra. Rather than charging the tax on the discounted price of goods, it charged tax on the undiscounted, full price of the goods. While the reasoning in *Parker* may be proper in that scenario, this reasoning, however, does not apply to the case at bar.

An important difference between *Parker* and the case at bar is the taxes at issue. In *Parker*, the store overcharged the State sales tax. In the present case, the Defendants-Appellees purported to charge nonexistent county and municipal excise taxes. An "excise tax is a tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege." *Columbus & Southern Ohio Electric Co. v. Porterfield* (1974), 41 Ohio App.2d 191, 196-197. While excise

taxes and sales taxes are similar, they are not completely equivalent. An excise tax “is sufficiently broad in meaning to include every form of taxation not a burden laid directly on persons or property.” *Village of Northfield v. Northeast Ohio Harness* (1983), 13 Ohio App.3d 218, 219. The State sales tax is a type of excise tax. *Philips Industries, Inc. v. Limbach* (1988), 37 Ohio St.3d 100, 102-103, quoting *Howell Air, Inc. v. Porterfield* (1970), 22 Ohio St.2d 32. Because an excise tax encompasses many different kinds of taxes, including the sales tax, this means that not all excise taxes are sales taxes, and the two terms cannot be used interchangeably.

This distinction between different kinds of taxes is apparent throughout the Ohio tax laws, as the law uses ‘sales tax,’ ‘use tax,’ and ‘excise tax’ differently. Ohio R.C. §5739.02 allows the State to collect a sales tax at a rate of five and one-half per cent. The relevant section reads:

For the purpose of providing revenue with which to meet the needs of the state * *
*, an excise tax is hereby levied on each retail sale made in this state.
(A)(1) The tax shall be collected as provided in section 5739.025 of the Revised
Code * * *. On and after July 1, 2005, the rate of the tax shall be five and one-half
per cent.

R.C. §5739.01 defines a ‘sale’ to include any transaction which lodging by a hotel is or is to be furnished to transient guests. The relevant section reads:

(B) “Sale” and “selling” include all of the following transactions for a consideration
in any manner, whether absolutely or conditionally, whether for a price or rental, in
money or by exchange, and by any means whatsoever: * * *
(2) All transactions by which lodging by a hotel is or is to be furnished to transient
guests

While the State levies a sales tax on lodging (one form of excise tax), the tax imposed by other political subdivisions on lodging is just an ‘excise tax.’ R.C. §5739.08 authorizes municipalities and townships to levy excise taxes. The relevant section reads:

The levy of an excise tax on transactions by which lodging by a hotel is or is to be

furnished to transient guests pursuant to section 5739.02 and division (B) of section 5739.01 of the Revised Code does not prevent any of the following.

(A) A municipal corporation or township from levying an excise tax for any lawful purpose not to exceed three per cent on transactions by which lodging by a hotel is or is to be furnished to transient guests in addition to the tax levied by section 5739.02 of the Revised Code.

The State legislature uses the terms 'sales tax' and 'excise tax' differently. While the sales tax is considered an excise tax, the excise tax levied by municipal corporations and townships on lodging is not a sales tax. The legislature obviously included 'lodging' in its definition of 'sales' for the purposes of a State sales tax. Had they wanted to allow municipalities and townships to levy a sales tax on lodging, they could have said so. They, however, only wanted municipalities and townships to be able to impose excise taxes on lodging, as evidenced by the words used in the laws.

As part of the basis for its decision in *Parker*, the Court of Appeals considered how R.C. §5739.02(E) creates a duty on the part of the vendor to remit excessively collected taxes. This section, however, only deals with sales taxes. It says nothing about collecting excess excise taxes. In fact section E is specifically discussing "tax collection for the benefit of the state." R.C. 5739.08 does not benefit the State but municipalities, townships, and counties. Thus, R.C. 5739.02 does not apply to the 'excise tax' at issue here. Because R.C. 5739.02(E) created a duty to remit sales taxes to the State, the court said Ms. Parker's exclusive remedy was to make a claim against the State of Ohio. This analysis under *Parker* again does not apply to the case at bar. While this section creates a duty for Defendants-Appellees to remit to the State the State sales tax it collects, its application to the present case stops there. This section does not create a duty for Defendants-Appellees to remit the excise tax to the county, because R.C. §5739.08, the section authorizing excise lodging taxes, is not enumerated in R.C. §5739.02, while other tax sections are. More importantly, it says nothing

about remitting charges that are not truly taxes, such as those in this case.

In *Parker*, the court dismissed for lack of subject matter jurisdiction because it said that the claim should have been brought in the Court of Claims. This was the correct court because the incorrectly charged sales tax had gone to the State and only the State could refund it. Again, this is much different from the present case. The State is not entitled to collect county and municipality excise taxes. Most importantly, the charges collected by Defendants-Appellees were not a miscalculation of excise taxes, but rather it was a deliberate attempt to defraud consumers by charging them more money disguised as a municipal or county excise tax.

Part of the *Parker* court's reasoning in determining the action to recover State sales tax must be filed in Ohio's Court of Claims was that it was the State's treasury which would ultimately be affected if the plaintiff's suit for monetary damages was successful. *Parker*, supra at ¶10. But, in this case, the converse is true. The Butler County and City of Fairfield treasuries have no involvement in the moneys falsely collected by Defendants-Appellees. First of all, in this case, the Defendants-Appellees did not remit to any governmental body the moneys it collected as 'excise taxes' that was above the amount legally imposed. Second, R.C. 5937.08 and 5939.02 did not impose a duty of Defendants-Appellees to remit monies collected under a purported county or municipal tax to that county or municipality. Thus, neither the treasury department of the State nor the county or municipal treasury departments received any of the excessively collected 'excise tax' in this case. The 'excise tax' was just a ruse for extracting additional money from the Defendants-Appellees' unwitting patrons. Thus, the Butler County and City of Fairfield treasuries do not have any of the illegally collected moneys to disburse.

Likewise, *Parker* relied upon Ohio Administrative Code 5703-9-03, which does not apply

here. There are two reasons why this section of the Ohio Administrative Code does not apply to the case at bar. First, OAC 5703-9-03 is a section that deals with applying for a refund of sales and use taxes. As has been discussed above, the Defendants-Appellees did not overcharge a sales or use tax. Rather, it purported to be charging an excise tax. OAC 5703-9-03 says nothing about excise taxes. Because 'excise tax' has been used independently of 'sales' and 'use' taxes throughout Ohio law as was discussed above, they are different concepts. Secondly, the Defendants-Appellees did not charge the wrong amount or miscalculate the amount of tax owed. It just fraudulently pretended to be collecting a 'tax'. Defendants-Appellees could have just as easily claimed it was a cleaning charge or perhaps a cable or utility charge. This case is not really about taxes but about deception.

The Appellate Court also relied heavily in its decision on the case of *Bergmoser v. Smart Document Solution* (N.D. Ohio Feb. 22, 2007), U.S. Dist. Court No. 1:05CV2882, 2007 WL 634674 in support of its holding that the improper collection of taxes claim must be brought against the taxing entity rather than the Defendants-Appellees. In *Bergmoser*, the court discusses how a consumer can seek a refund of a sales tax. First, a consumer can ask the vendor, and if that is unsuccessful, the consumer can file an application for refund with the tax commissioner. This, however, is also irrelevant in the case at bar. As was described above, this section is only about sales tax, and in the case at bar, the Defendants-Appellees purported to charge an excise tax.

Finally, it cannot be emphasized enough that in this action Volbers-Klarich is not merely seeking a refund from Defendants-Appellees of the illegally collected excise 'tax' but have brought a direct claim for fraud and a claim pursuant to the Ohio Consumers Sales Practices Act for damage from Defendants' deceit. In *Parker*, the plaintiff was merely bringing claims for breach of contract, negligence, and dereliction of statutory duty. *Parker*, supra. There was not an allegation of fraud

or a violation of the Ohio Consumer Sales Practices Act. In *Parker*, the store charged the wrong amount of sales tax because it was improperly calculated. In the case at bar, Defendants-Appellees did not charge the wrong amount of tax. Rather, they pretended to charge a tax which was actually non-existent. This allowed Defendants-Appellees to collect more money from its patrons in a dishonest and illegal way by leveling charges against the guest couched as additional taxes, which in reality, were not owed.

The Appellate Court incorrectly agrees with the Trial Court that Volbers-Klarich's only remedy is to file a claim against Butler County and the City of Fairfield, the taxing entities, for a tax refund. However, for all of the reasons above, this is incorrect. The main basis for the Appellate Court's Decision was the *Parker* decision and its reasoning. However, *Parker's* analysis does not apply here. The Defendants-Appellees did not over collect or miscalculate a tax that resulted in a surcharge. Instead, Defendants-Appellees concocted a scheme to collect an additional charge against its customers and claimed it was a tax. The supposed tax was a county or municipal 'excise tax,' not a State sales tax, and not being a legitimate tax, no government agency was entitled to collect it nor was it paid to any governmental agency. Consequently, Butler County and the City of Fairfield is not in a position to offer a refund. All of the cases cited by the Appellate Court in its Decision are irrelevant because they do not apply to the present case. This case is a typical fraud case. Defendants-Appellees should not be permitted to escape liability for their fraud and deception merely by falsely claiming it is a 'tax'. Volbers-Klarich has alleged meritorious and valid claims upon which relief can be based and the Appellate Court therefore improperly affirmed the Trial Court's decision granting Defendants-Appellees' Motion to Dismiss.

II. Appellant Volbners- Klarich's Proposition of Law No. II: When a Company Collects Money under the Guise of a "Tax", While Knowing No Such Tax Exists, the Injured Party Has a Claim Based on the Ohio Consumer Sales Practices Act.

The Appellate Court also incorrectly held in its decision that Volbers-Klarich does not have a proper claim against Defendants-Appellees under the Ohio Consumer Sales Practices Act. The purpose of Ohio Consumer's Sales and Practices Act is to protect consumers from deceptive acts and practices. *Delawder v. Platinum Financial Services Corp.* (S.D. Ohio 2005), 443 F.Supp.2d 942, 953; *Mermer v. Medical Correspondence Servs.* (1996), 115 Ohio App.3d 717, 721. However, in order to be a consumer to bring a claim pursuant to the OCSPA, one must be an "individual." *Findlay*, supra at 862. Neither a county nor a city are individuals under the OCSPA and neither is therefore entitled to bring a claim under the OCSPA. *Id.* It follows that neither Butler County nor the City of Fairfield is entitled to bring a claim against Defendants-Appellees under the OCSPA. Only Volbers-Klarich as an individual consumer can bring a claim against Defendants-Appellees for violation of the OCSPA and this claim was therefore improperly dismissed.

Further, the purpose of the OCSPA of protecting consumers from unfair, deceptive, and unconscionable acts and practices is best served by allowing Volbers-Klarich's OCSPA claim against Defendants-Appellees to remain in this case. Defendants-Appellees' fraudulent scheme in this case to collect additional charges from its customers under the guise of a fictional and non-existent tax in order to line its pockets is just the type of deceptive and unconscionable acts which the OCSPA was designed to protect against. Therefore, because it would also further the designated purpose of the OCSPA of protecting individual consumers from deceptive acts by vendors, Volbers-Klarich's OCSPA claim should not have been dismissed along with the rest of the Complaint and

the Appellate Court erred in affirming the Trial Court's Decision to dismiss these claims.

III. Appellant Volbners-Klarich's Proposition of Law No. III: An Injured Party May Bring a Fraud Claim Against a Company Took Money from the Party by Claiming a "Tax" Was Imposed When it Knew That No Such "Tax" Existed.

The Appellate Court also held in its Decision that Volbers-Klarich does not have a valid fraud claim against Defendants-Appellees. However, this is simply incorrect. In order to set forth a valid fraud claim in Ohio the plaintiff must set forth the following elements: (a) a material statement or omission of a material fact; (b) which is made by the defendant with knowledge of its falsity or such utter disregard and recklessness as to the veracity of the statement; (c) with the intent of misleading the plaintiff to rely upon the fraudulent statement; (d) justifiable reliance by the plaintiff upon the fraudulent statement; and (e) resulting injury which was proximately caused by the plaintiff's reliance. *Burr v. Board of County Commissioners* (1986), 23 Ohio St. 3d 69. According to Civil Rule 9(B) the circumstances constituting the fraud must be stated with sufficient particularity to provide the defendant with notice of the claim and prepare an adequate response.

In order to determine if a fraud claim is pled with sufficient particularity, the court must determine if the allegations in the complaint are specific enough to inform the defendant of the act complained of and enable the defendant to prepare an effective response and defense. *Okocha v. Fehrenbacher* (1995), 101 Ohio App.3d 309, 320. However, even though the pleading of a fraud claim may be vague, if the defendant has notice of the matter of which plaintiff is complaining, strict application of the rule that fraud be pled with particularity serves no useful purpose. *Aluminum Line Products Co. v. Brad Smith Roofing Co., Inc.* (1996), 109 Ohio App.3d 246, 259. The rule requiring fraud to be pled with particularity must be applied in conjunction with the general rules contained

in Civil Rule 8(A)(1) and 8(E)(1) that pleadings need only contain “a short and plain statement of the claim” and that all allegations should be “simple, concise, and direct.” *F&J Roofing Company v. McGinley & Sons, Inc.* (1987), 35 Ohio App.3d 16, 17.

In the case at bar, Volbers-Klarich has clearly set forth her claim for fraud with sufficient particularity to survive a motion to dismiss. First, she states that in August of 2002, she stayed at Defendants-Appellees’ Hampton Inn and at that time was fraudulently charged for a non-existent county and municipal excise tax of 6.5% related to the rental of her hotel room and that Defendants-Appellees intentionally converted these fraudulently obtained funds for their own use. Therefore, Volbers-Klarich has set forth a material false statement and/or omission, i.e. the non-existent excise taxes charged to Volbers-Klarich, which was made by Defendants-Appellees and charged to Volbers-Klarich with knowledge of their non-existence and falsity, with the intent to induce her to rely on the false statements. Finally, Volbers-Klarich’s has properly alleged that she relied on Defendants-Appellees’ false statements and/or omissions regarding the non-existent excise taxes they charged her for when she rented the hotel room in August of 2002 and kept for their own use, and that she incurred damages as a result.

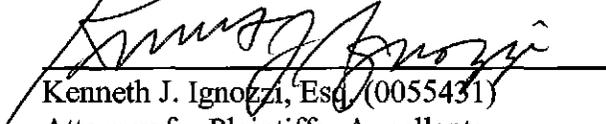
Presuming all of the factual allegations in the Amended Complaint are true and viewing them in a light most favorable to Volbers-Klarich, she has undoubtedly set forth her fraud claim against Defendants-Appellees with sufficient particularity to put Defendants-Appellees on notice of the claim and to prepare an adequate response. Volbers-Klarich has set forth the specific misrepresentation made by Defendants-Appellees, when the statement was made, and that Defendants-Appellees’ representatives were responsible for the fraudulent statements. This is sufficient particularity in Ohio for a fraud claim to survive a motion to dismiss. Further, simply

because the Defendants-Appellees referred to their fraudulent conduct as a "Tax" should not shield it from being liable for committing fraud. The Appellate Court therefore clearly erred when it affirmed the Trial Court's Decision dismissing the fraud claims against Defendants-Appellees.

CONCLUSION

For the above stated reasons, this case involves matters of public or great general interest. This Court should therefore accept this discretionary appeal and accept jurisdiction.

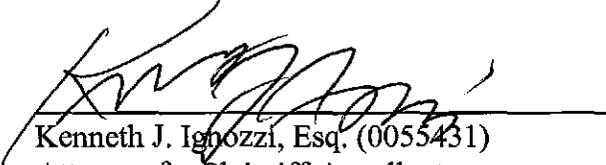
Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by regular U.S. mail, postage paid, this 21 day of May, 2009.

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APPENDIX

Opinion of the Butler County Court of Appeals (April 6, 2009)	EXHIBIT A
Judgment Entry of the Butler County Court of Appeals (April 6, 2009)	EXHIBIT B
Opinion of the Butler County Common Pleas Court (June 12, 2008)	EXHIBIT C

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

JULIE VOLBERS-KLARICH, :
 :
 Plaintiff-Appellant, : CASE NO. CA2008-07-160
 :
 - vs - : OPINION
 : 4/6/2009
 :
 MIDDLETOWN MANAGEMENT, INC., :
 et al., :
 :
 Defendants-Appellees. :
 :

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2007-04-1344

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BRESSLER, P.J.

{11} Plaintiff-appellant, Julie Volbers-Klarich, appeals the decision of the Butler
County Court of Common Pleas granting the motion to dismiss pursuant to Civ.R. 12(B)(6) by
defendants-appellees, Middletown Management, Inc. and Middletown Innkeepers, Inc.
(hereinafter Middletown Management). We affirm the trial court's decision.

{12} Middletown Management owns and operates the Hampton Inn in Fairfield.

EXHIBIT

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A

Ohio. Appellant stated that she is part of a class which includes "all other unnamed or yet unknown number of individuals and/or corporations which purchased lodging at the Hampton Inn, as a paying guest from 1999 through the date of filing th[e] complaint" who were supposedly overcharged nonexistent room taxes. Appellant's complaint alleged that she stayed at the Hampton Inn in August of 2002 where she was charged room taxes which exceeded the taxes allowable by law. In particular, appellant asserted that Middletown Management has been charging their customers excessive sales and excise taxes in the amount of 12 percent since 1999. According to appellant, the maximum amounts Middletown Management could have charged were 5.5 percent from 1999 to September 30, 2003, and 8.5 percent from October 1, 2003 to the present.¹ Appellant's complaint further claimed that Middletown Management has been converting the difference between the tax amounts they charged their guests, and the tax amounts required by law.

{¶3} Middletown Management moved to dismiss pursuant to Civ.R. 12(B)(6) arguing appellant failed to state a claim upon which relief could be granted.² Oral argument was heard on the matter, and the trial court granted the motion to dismiss. Appellant now appeals the trial court's decision by raising one assignment of error.

{¶4} "THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF-APPELLANT'S CLAIMS AGAINST DEFENDANT-APPELLEE FOR FAILURE TO STATE A CLAIM UPON

1. {¶a} The maximum charges are based on appellant's contention that only the state of Ohio charged taxes on hotel stays in Fairfield, Ohio in the amount of 5.5 percent from 1999 to September 30, 2003. Pursuant to Butler County Board of Commissioners Resolutions 03-8-1314 (Aug. 11, 2003) and 03-9-1542 (Sept. 18, 2003), as of October 1, 2003, Butler County began assessing a lodging excise tax of three percent, changing the maximum amount taxable to a hotel guest to 8.5 percent.

{¶b} Although the 12 percent amounts charged were purportedly for state, county, and local taxes, Butler County only began exacting a three percent hotel excise tax on October 1, 2003 and the city of Fairfield, Ohio has only just added a transient lodging tax of three percent by passing Chapter 187 of Fairfield's Codified Ordinances on April 9, 2007.

2. Prior to filing this motion to dismiss, Middletown Management filed a Civ.R. 12(B)(1) motion claiming the trial court did not have subject matter jurisdiction. This motion was withdrawn and appellant was given an extension to file an amended complaint.

WHICH RELIEF CAN BE GRANTED PURSUANT TO CIVIL RULE 12(B)(6) BECAUSE THE IMPROPER TAX COLLECTION CLAIMS WERE PROPERLY ASSERTED AGAINST THE DEFENDANT-APPELLEE; PLAINTIFF-APPELLANT ASSERTED A PROPER CLAIM UNDER THE OHIO CONSUMER SALES PRACTICES ACT; AND PLAINTIFF-APPELLANT'S FRAUD CLAIM WAS STATED WITH SUFFICIENT PARTICULARITY."

{¶5} "A motion to dismiss for failure to state a claim upon which relief can be granted * * * tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. "A [successful] Civ.R. 12(B)(6) motion only determines whether the pleader's allegations set forth an actionable claim." *Pyle v. Ledex, Inc.* (1990), 49 Ohio App.3d 139, 143.

{¶6} "In order for a complaint to be dismissed under Civ.R. 12(B)(6) * * *, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief." *Cincinnati v. Berretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶5. "In construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145.

{¶7} "An order granting a Civ.R. 12(B)(6) motion to dismiss is subject to de novo review." *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5. Thus, a reviewing court must independently review the complaint to determine whether dismissal was appropriate, and need not defer to the trial court's decision. *Chinese Merchants Assoc. v. Chin*, 159 Ohio App.3d 292, 2004-Ohio-6424, ¶4.

{¶8} Appellant argues that the trial court was incorrect in granting Middletown

Management's Civ.R. 12(B)(6) motion. Within this single assignment of error appellant raises three sub-issues. The first of these issues is her argument that she properly asserted claims against Middletown Management rather than the purported taxing agencies.

{¶9} In its decision the motion to dismiss, the trial court found that Middletown Management was not the proper party in a suit to obtain a refund for the nonexistent taxes. Instead, the trial court found that the proper parties were taxing entities, in whose names the taxes were collected. In reaching this decision, the trial court primarily relied on two cases: *Parker v. Giant Eagle, Inc.*, Mahoning App. No. 01 C.A. 174, 2002-Ohio-5212; and *Bergmoser v. Smart Document Solutions, L.L.C.* (N.D. Ohio Feb. 22, 2007), Case No. 1:05CV2882, 2007 WL 634674, affirmed (C.A.6, 2008), 268 Fed.Appx. 392.

{¶10} Appellant argues that both *Parker* and *Bergmoser* dealt with consumers requesting refunds of overcharged and wrongfully assessed "state" taxes, whereas the "taxes" collected by the Hampton Inn were excise in nature rather than sales taxes, thus making any laws and cases regarding state tax refunds inapplicable. In addition, appellant claims she is not seeking a refund of illegally collected taxes, but is instead bringing claims of fraud and a violation of R.C. Chapter 1345, otherwise known as the Ohio Consumer Sales Protection Act (OCSPA).³ Appellant also argues that the county and city are not obligated to refund the "taxes" because no county or city tax ordinance was in effect when she stayed at the Hampton Inn. Finally, appellant contends that Middletown Management should not be allowed to "escape liability," by calling the charge a "tax" on her invoice.

{¶11} We are unaware of any cases that have dealt with this particular issue directly, but we are guided, as was the trial court, by past decisions involving refund claims for taxes improperly collected or assessed.

3. This argument is essentially in appellant's second assignment of error, and as such, we will address it in that portion of the opinion.

{¶12} In *Decor Carpet Mills, Inc. v. Lindley* (1980), 64 Ohio St.2d 152, the Ohio Supreme Court determined that state sales taxes, even those wrongfully collected, are a "tax collection for the benefit of Ohio." *Id.* at 154-55. Furthermore, the *Decor* court stated that the party collecting the taxes is merely a trustee for the state. *Id.* Thus, *Decor* stands for the proposition that any taxes, even those which are overpayments, which are collected on behalf of the state belong to the state as the party collecting the taxes is merely a trustee of those funds. *Id.*

{¶13} The Second Appellate District, in *Barker Furnace Co. v. Lindley* (June 2, 1981), Montgomery App. No. 6813, 1981 WL 2815, found that where a party charges and collects a nonexistent tax under the apparent authority of state law, the party may not keep the amount collected just because collection was erroneous. *Id.* at *3. The *Barker* court noted, "so long as the collection *purports to be a collection of sales tax*, the vendor is responsible for payment to the State." (Emphasis added.) *Id.* The policy behind this, said the court, is that no one but the state should benefit from the collection of a tax. *Id.* Finally, the *Barker* court observed that by collecting the nonexistent taxes from its customers, the company assumed the responsibility for the collections and "the duty to remit them to the State." *Id.* at *4. Therefore, by characterizing a charge as a state tax, even if it is nonexistent, a vendor has a "duty to remit them to the State." *Id.*

{¶14} In *Parker v. Giant Eagle, Inc.*, 2002-Ohio-5212, a customer filed suit against a grocery store claiming it had overcharged her state sales tax on her groceries; however, her case was dismissed by the trial court for failure to state a claim on which relief could be granted. *Id.* at ¶1, 6. On appeal, the Seventh Appellate District held that the plaintiff should have filed her suit against the state of Ohio, in the Ohio Court of Claims, as it would ultimately be the state's treasury that would be affected if her claim was successful. *Id.* at ¶29-30. The *Parker* court stated that the grocery store was under a duty to remit the taxes to

the state, and even if the store had failed to remit them, the state still had a "right to receive th[e] funds." *Id.* at ¶29. The court pointed out that if the plaintiff was successful in her suit against the grocery store, it would in fact hinder or preclude the state's rights to the funds collected. *Id.* In essence, *Parker* suggests that a party must file against the taxing entity, rather than the vendor, as the refund should come from the state's treasury, whether or not the taxes were actually remitted to the state. *Id.* at ¶29-30.

{¶15} In *City of Findlay v. Hotels.Com, L.P.* (N.D. Ohio 2006), 441 F.Supp.2d 855, Findlay filed suit against several online travel companies based on underpayment of guest occupancy taxes to the city. *Id.* at 857-58. Relying on *Barker*, the district court found that the policy that no one should derive a benefit from sales taxes except the taxing entity was sound and applied to Findlay's claims. *Id.* at 861. The court also said "that even when a taxing statute fixes no liability, the collector is responsible for its payment to the proper taxing authority as long as the collection *purports* to be a collection of the tax." (Emphasis sic.) *Id.*, citing *Barker*, 1981 WL 2815 at *8-9. Although the city was only trying to collect underpayments of existing taxes, *Findlay* essentially applied the state tax line of cases to actions regarding local taxes.⁴

{¶16} Finally in *Bergmoser*, 2007 WL 634674, plaintiffs filed suit against Smart alleging, inter alia, fraud, and a violation of the OCSPA based on impermissibly being charged sales tax and excessive postage for copies. *Id.* at *1. The district court found that Ohio Adm.Code 5703-9-07 sets forth the procedure a consumer must use in order to obtain a refund of state sales tax. *Id.* at *2. A consumer's sole remedy, to obtain a state sales tax refund, is to file an application for refund with the tax commissioner, as it is the state's treasury that will be affected by the refund. *Id.*, citing *Parker*, 2002-Ohio-5212 at ¶29. The

4. The *Findlay* court also dismissed the city's OCSPA claim however this was because the court found Findlay lacked standing to bring the claim, and failed to plead the two prerequisites to a class action under the OCSPA in R.C. 1345.09(B). *Findlay*, 441 F.Supp.2d at 862-63.

Bergmoser court further stated the rationale in *Parker* is "that a consumer does not have a direct cause of action against a vendor who over-collected or wrongfully collected taxes." *Id.* at fn. 2. The court also noted that if a vendor failed to remit excessive taxes to the state, the state has a right to those funds. *Id.*, citing *Parker* at ¶29. As to the plaintiffs' OCSPA claims, the *Bergmoser* court dismissed them finding, "if [the] defendant wrongfully assessed and collected sales tax, plaintiffs' proper remedy is to file an application with the tax commissioner." *Id.* at *3.

{¶17} While we agree with appellant to the extent that most of the prior case law deals with state tax refunds, and the tax at issue in this case would clearly be considered an excise tax, we believe the rationale espoused by these cases is sound. Therefore, when a consumer seeks a refund of taxes, even where they are nonexistent taxes, the consumer must apply to the taxing entity for a refund. See *Parker*, 2002-Ohio-5212 at ¶29-30; *Bergmoser*, 2007 WL 634674 at *2-3.

{¶18} Even though Butler County and Fairfield were not collecting excise taxes for lodging at the time of appellant's stay, and presumably have never collected them from Middletown Management, at least until they each enacted taxing legislation, they are entitled to those funds since they were collected by the Hampton Inn as trustee for Butler County and Fairfield. See *Decor*, 64 Ohio St.2d at 154-55; *City of Findlay*, 441 F.Supp.2d at 861; *Barker*, 1981 WL 2815 at *3-4. It is thus the responsibility of Butler County and Fairfield to refund those monies to the appropriate parties, as it would ultimately be the county and city's treasuries that would be affected by any refunds, even for taxes erroneously or illegally collected. See *Parker*, 2002-Ohio-5212 at ¶29-30; *Bergmoser*, 2007 WL 634674 at *2; *Barker*, 1981 WL 2815 at *3-4. Because appellant must seek any refund from Butler County

and Fairfield, Middletown Management is not a proper party to her claim for reimbursement.⁵

{¶19} While appellant argues Middletown Management will "escape liability" if we affirm the trial court's dismissal, we can only point out that any excise taxes collected by the Hampton Inn were collected for the benefit of Butler County and Fairfield and belong wholly and solely to them. Therefore, Middletown Management cannot escape liability for the collection because both the county and the city can lay claim to the money that was collected in their names.

{¶20} After a careful review of the legislation for Butler County (Resolution Nos. 03-8-1314 and 03-9-1542) and Fairfield (Codified Ordinances Chapter 187), we have been unable to locate an analogous procedure to that contained within Ohio Adm.Code 5703-9-07 for the refund of state sales tax. However, this in no way means that such a procedure does not exist. While we recognize that Fairfield has a refund procedure, in Codified Ordinances 187.04, to return illegal or erroneous payments made to vendors or to transient guests where the guest has paid the city directly, they do not indicate how a transient guest obtains a refund of illegal or erroneous taxes paid directly to a vendor. Here we are guided by the *Parker* court which was faced with a similar dilemma. Prior to the amendment of R.C. 5739.07, which now allows consumers to apply to the tax commissioner for a refund, the *Parker* court found that even in the face of no applicable procedure, the consumer still had to apply to the taxing entity for a refund. *Parker*, 2002-Ohio-5212 at ¶¶15-29; accord *Bergmoser*, 2007 WL 634674 at *2, fn. 2.

{¶21} Based on these prior decisions, which dealt with what we believe to be substantially similar issues, we find that Middletown Management is not a proper party, in this particular suit, to reclaim the money appellant paid to the Hampton Inn for nonexistent county

5. This does not preclude Butler County or Fairfield from joining Middletown Management as a party to any suit to reclaim monies collected erroneously. *Parker* at ¶30 (finding that "[i]t would be up to the State of Ohio to determine whether [Giant] should be joined as a party to the suit.)

and city excise taxes. Therefore, the trial court correctly dismissed appellant's claim against Middletown Management.

{¶22} The second sub-issue is that appellant's claims against Middletown Management are based on the OCSPA rather than any "tax" laws. Appellant argues that the purpose of the OCSPA is to protect consumers against unfair, deceptive and unconscionable acts. As such, the OCSPA applies to her claim because collecting additional charges from consumers in the form of nonexistent taxes is a deceptive and unconscionable act which was allegedly perpetrated by Middletown Management.

{¶23} "The [O]CSPA is a remedial statute designed to compensate for traditional consumer remedies." *Burdge v. Kerasotes Showplace Theatres, L.L.C.*, Butler App. No. CA2006-02-023, 2006-Ohio-4560, ¶39. The OCSPA prohibits acts or practices by suppliers in consumer transactions which are "unfair or deceptive" and/or "unconscionable." *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29, citing R.C. 1345.02 and 1345.03.

{¶24} Here again, we feel compelled to follow the logic suggested by the district court in *Bergmoser* when it dismissed the plaintiffs' OCSPA claim. In particular, the court stated, "if defendant wrongfully assessed and collected sales tax, plaintiffs' proper remedy is to file an application with the tax commissioner." *Bergmoser*, 2007 WL 634674 at *3. While overcharging a customer for a product or service in a consumer transaction would in most circumstances be violative of the OCSPA, we believe that the county and city tax charge alleged by appellant to be unfair, deceptive and unconscionable falls outside the scope of the OCSPA precisely because it was invoiced as a tax.

{¶25} We also observe, as did the *Findlay* court, that appellant's complaint is also defective, as a purported class action, because she failed to plead the requirements of a class action pursuant to R.C. 1345.09(B). *Findlay*, 441 F.Supp.2d at 863. "Under R.C. 1345.09(B), a class action is permitted under the Act if the plaintiff alleges that the

substantive provisions of the Act have been violated, and (1) a specific rule or regulation has been promulgated under R.C. 1345.05 that specifically characterizes the challenged practice as unfair or deceptive, or (2) an Ohio state court has found the specific practice either unconscionable or deceptive in a decision open to public inspection." *Johnson v. Microsoft Corp.*, 155 Ohio App.3d 626, 2003-Ohio-7153, ¶21.

{¶26} Therefore, because appellant's claim falls outside the scope of the OCSPA, and because appellant failed to specifically plead a class action pursuant to the requirements of R.C. 1345.09(B), appellant's OCSPA claims were properly dismissed by the trial court.

{¶27} In her third sub-issue, appellant argues that her fraud claim was pled with sufficient particularity to survive dismissal. Appellant also argues that the trial court erred in requiring documentation of her stay as part of her fraud pleading thereby deviating from a Civ.R. 12(B)(6) standard of review.

{¶28} While Civ.R. 9(B) requires that the circumstances constituting fraud be pled with particularity, we need not determine whether appellant properly pled her claim for fraud as we have already established that appellant's proper remedy, for any collection of improper taxes, is filing an application for a refund from the taxing entity. See, e.g., *Bergmoser*, 2007 WL 634674. Thus, appellant cannot file an action in fraud against Middletown Management for the allegedly improper collection of county and city excise taxes.

{¶29} In conclusion, for the reasons stated above, the trial court properly dismissed appellant's claims against Middletown Management, because appellant's sole cause of action and remedy is to obtain a refund from the taxing entity. Appellant's assignment of error is hereby overruled.

{¶30} Judgment affirmed.

WALSH and RINGLAND, JJ., concur.

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COURT OF APPEALS

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CLERK OF COURTS

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IN THE COURT OF APPEALS

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TWELFTH APPELLATE DISTRICT OF OHIO

CINDY CARPENTER
BUTLER COUNTY
CLERK OF COURTS

JULIE VOLBERS-KLARICH,

Plaintiff-Appellant,

- vs -

MIDDLETOWN MANAGEMENT, INC.,
et al.,

Defendants-Appellees.

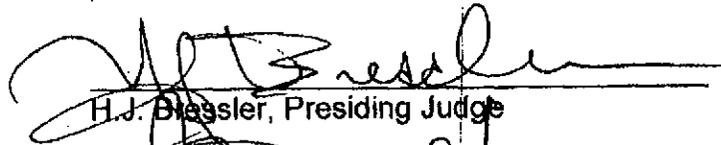
CASE NO. CA2008-07-160

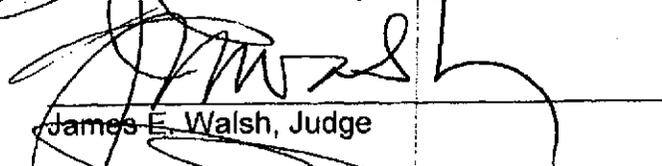
JUDGMENT ENTRY

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.


H.J. Blessler, Presiding Judge


James E. Walsh, Judge

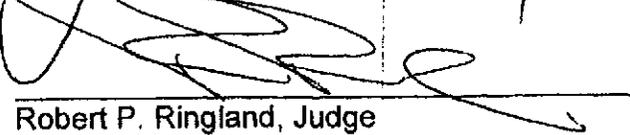

Robert P. Ringland, Judge

EXHIBIT
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FILED in Common Pleas Court
BUTLER COUNTY, OHIO

JUN 12 2008

CINDY CARPENTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

JULIE VOLBERS-KLARICK,	:	CASE NO: CV 2007 04 1344
Plaintiff,	:	JUDGE PATRICIA S. ONEY
vs.	:	DECISION AND ENTRY
MIDDLETOWN MANAGEMENT,	:	GRANTING DEFENDANT'S
INC., et al.,	:	MOTION TO DISMISS
Defendant.	:	PLAINTIFF'S AMENDED
	:	COMPLAINT
	:	<u>FINAL APPEALABLE ORDER</u>

On August 21, 2007, Defendants, Middletown Innkeepers, Inc. and Middletown Management, Inc. (hereinafter referred to collectively as "Defendants") filed a motion to Dismiss Plaintiff's Amended Complaint pursuant to Civ. R. 12(B)(6), arguing that the Complaint filed by Plaintiff, Julie Volbers-Klarick's (hereinafter referred to as "Plaintiff") fails to state a claim upon which relief can be granted. Plaintiff's amended complaint alleges (1) that Defendants collected an amount from Plaintiff as sales and excise tax above the amount required by statutes and/or ordinances and only submitted the required amount to the taxing entity, and (2) that Defendants fraudulently collected an amount as an excise tax which was nonexistent under state/local law.

Defendants argue that Plaintiff has improperly brought this action against the vendor. Defendants state that any claim for improperly or illegally collected taxes must be brought directly against the taxing entity. The Defendants conclude that the Amended Complaint remains subject to dismissal as Defendants were merely the collectors of the sales and excise tax and that the tax legally belongs to the taxing entity that has the authority to issue a refund.

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

EXHIBIT
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On September 11, 2007, Plaintiff filed a Memorandum in Opposition and Motion to File a Second Amended Complaint. Plaintiff's Memorandum in Opposition argues that the Defendants perpetrated a fraud on the Plaintiff under the guise that it was engaged in the collection of sales and excise taxes for the hotel room rented by Plaintiff. Plaintiff further seeks to Amend the Complaint for the second time to add the taxing entities of Butler County and the City of Fairfield. Defendants filed a Reply on or about September 18, 2007 stating that Defendants had filed a Motion to Dismiss previously as to the original Complaint on the basis that the original Complaint had two defects. The Plaintiff amended her Complaint and only addressed the first defect, but not the second. Defendants argue in this Motion to Dismiss that Plaintiff has had her opportunity to amend the Complaint and adding the taxing entities would not change the position of Defendants that there is no cause of action against the Defendants for taxes improperly collected.

Civil Rule 12(B)(6) Standard

Pursuant to Civil Rule 12(B)(6), "[a] motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, (1992), 65 Ohio St.3d 545, 547. Therefore, a "court must analyze whether or not there is a set of facts which would allow [the suing party] to recover." *Masek v. Marroulis*, 11th Dist. No. 2007-T-0034, 2007-Ohio-6159. "If, after undertaking this review, there is no set of facts within the complaint which would entitle [the suing party] to relief, the moving party is entitled to judgment as a matter of law." *Id.*, citing to *Gawloski v. Miller Brewing Co.* (1994), 96 Ohio App.3d 160, 163.

The Appropriate Party in this Matter

The Plaintiff's claims allege that Defendants improperly collected sales and excise taxes from Plaintiff and other guests. Although Plaintiff attempts to distinguish a sales tax from an excise tax and argue that the Defendants, as the vendors, are the appropriate party to sue, this Court disagrees. An excise tax is defined as "a tax imposed on a particular act, event, or occurrence, with the object of providing revenue for the general expenses of government." *Fletcher Cyclopedia of the Law of Corporations* (2007), Ch. 60 Taxation, §6898 Excise tax. A sales tax is a type of excise tax. As such, it is reasonable to examine any existing law on either sales or excise taxes in deciding this matter.

In Ohio, the legislature created law on sales taxes that expressly state that the vendor is a trustee of the taxing entity charged with collecting the taxes for that entity. Oh. Rev. Code §5739.03; see also, *ERB Lumber Co. v. L&J Hardwood Flooring, Inc.* (1997), 118 Ohio App.3d. 421, 693 N.E.2d 287. The vendor is required to remit the taxes to the taxing entity, including any taxes collected in excess of the statutory rate. 86 Ohio Jurisprudence 3d. (2008) Taxation, §361. The funds collected are, therefore, merely collected by the vendor, but owned by the taxing entity. It is the taxing entity that has the right to issue refunds or pursue under payment or under collection of taxes. In fact, the legislators created Section 5739.07 of Ohio's Tax Code which sets forth this concept by designating that the tax commissioner has the authority to issue refunds. Section 5739.07 states that:

(C) The commissioner shall refund to the consumer taxes paid illegally or erroneously to a vendor only if:

(1) The commissioner has not refunded the tax to the vendor and the vendor has not refunded the tax to the consumer; or

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Common Pleas Court
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(2) The consumer has received a refund from a manufacturer or other person, other than the vendor, of the full purchase price, but not the tax, paid to the vendor in settlement of a complaint by the consumer about the property or service purchased.

Oh. Rev. Code §5739.07. The tax commissioner, as an agent of the taxing entity, has the authority and control of any funds collected by the vendors.

Recognizing that there is limited case law regarding a situation where improper taxes are collected by a vendor, the Court in *Parker v. Giant Eagle, Inc.* stated that the taxing entity is the proper party of such a suit as the treasury of the taxing entity is ultimately what will be affected by an award to the Plaintiff. *Parker v. Giant Eagle, Inc.* 7th Dist.), 2002-Ohio-5212. Later case law that discussed *Parker* indicated that the consumer must first request a refund from the vendor and then, upon refusal by the vendor, the consumer must petition the taxing entity for a refund. *Bergmoser v. Smart Document Solutions, LLC.* (February 22, 2007), U.S. Dist., N.D. Ohio, Eastern Div. No. 1:05CV2882, unreported, 2007 WL 634674. The Court in *Bergmoser* also found that the appropriate party to a suit for improperly collected taxes was the taxing entity and not the vendor. *Id.*

In addition to the case law, this Court notes that there is no indication that the legislature intended to create a private right of action by a consumer against a vendor for the improper collection of taxes. On the contrary, the applicable statutes and codes are not ambiguous as to the consumer's remedies, which are for the consumer to request a refund from the vendor and, if refused, then petition the taxing entity for the refund within four years of the payment of the illegal or improper tax. See, Ohio Admin. Code §5703-9-07(B) & (B)(2); Oh. Rev. Code §5739.07. Furthermore, it is reasonable to conclude that all taxing entities have similar schemes for their sales and excise taxes whereby a vendor is entrusted to collect the

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taxes and is beholden to the municipalities to remit any taxes collected for the sake of the local taxing entity. For this reason, amending the complaint a second time would not change the fact that Plaintiff has no claim against the Defendants for the taxes collected which were remitted to the taxing entity. Ultimately, Plaintiff would have to pursue the taxing entity.

Civil Rule 9(B) Standard

Plaintiff alleges fraud in her Complaint based on the belief that the Defendants collected (1) a tax in excess of the statutory requirement and (2) a nonexistent tax and kept those amounts. In Ohio, the elements of fraud are:

- “(a) a representation or, where there is a duty to disclose, concealment of a fact.
- (b) which is material to the transaction at hand;
- (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred;
- (d) with the intent of misleading another into relying upon it;
- (e) justifiable reliance upon the representation or concealment, and
- (f) a resulting injury proximately caused by reliance.”

Mercy Health Partners of Southwest Ohio v. Miller (Sept. 30, 2005), Hamilton County App. No. A0301165, unreported, 2005 WL 2592674, citing to *Wiley v. Good Samaritan Hospital*, 2004 Ohio App LEXIS 709, at *9, 2004 WL 315210 (Hamilton Cty Feb. 20, 2004) quoting *Burr v. Board of County Commissioners* (1986), 23 Ohio St.3d 69, 491 N.E.2d 1101, Syllabus

¶ 2.

In Ohio, Civ. R. 9(B) requires that “the circumstances constituting fraud or mistake shall be stated with particularity.” Oh Rev. Code §9(B). Ohio Courts have interpreted Civ.R. 9(B) to require a Plaintiff to allege “(1) specific statements claimed to be false, (2) the time and place the statements were made, and (3) which Defendant made the statements.” *Mercy Health Partners of Southwest Ohio v. Miller* (Sept. 30, 2005), Hamilton County App. No. A0301165, unreported, 2005 WL 2592674, citing to *Pollock v. Kanter* (1990), 68 Ohio App.3d 673, 681-82, 589 N.E.2d 443 (Cuyahoga Cty.), citing *Korodi v. Minot* (1987), 40 Ohio App.3d 1, 4, 531 N.E.2d 318 (Franklin Cty.).

Ohio courts previously determined that generalized statements of fraud are insufficient to meet the requirements of Civ. R. 9(B). One example is *Tackett Tire Sales, Inc. v. Bank One Dayton, Inc.*, where the appellate court affirmed the trial court’s dismissal of the first cause of action for fraudulent misrepresentation or inducement. *Tackett Tire Sales, Inc. v. Bank One Dayton, Inc.* (June 21, 1996), Montgomery County App. No. 15595, unreported, 1996 WL 339944. The Court found that “Tackett alleges that the false representations were made “prior to the execution of the document” and “in the course of Defendant’s solicitation of Plaintiff.” We conclude that this is too general to satisfy the pleading requirements of Civ.R. 9(B).” *Id.* Another example comes from the Twelfth District where in the Court found that the fraud claim was improperly asserted:

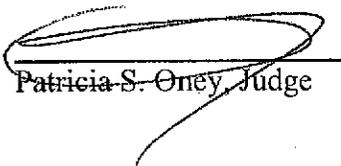
“Appellants’ answer averred that “[p]laintiffs made misrepresentations that are material to the contract and as a result of misrepresentations of material facts, the contract is null and void.” Because allegations of fraud must be pled with particularity, this statement in appellants’ answer was insufficient to establish a fraud defense.”

Stout v. Am. Group, 12th Dist. No. 2006-10-286, 2007-Ohio-4971 at ¶8.

In the matter before this Court, Plaintiff alleges fraud, but provides no facts to support that Defendants failed to remit the taxes or that Defendants kept the excess taxes collected. The allegation in the Plaintiff's Complaint is similar, in generalities, to that found by the *Stout* Court. As stated previously, vendors are obligated to remit any taxes collected and the presumption is that vendors do so in compliance with the law and to prevent being subject to penalties. At the oral hearing regarding this Motion, it was stated that no discovery has been undertaken by either party since the date of the filing of the Motion and responsive memoranda. Furthermore, Plaintiff does not even have documentary evidence of her stay at the Defendants' hotel to demonstrate the amount of taxes that she was charged regarding her stay. This lack of particularity translates to Plaintiff's failure to meet the heightened pleading requirement of Civ. R. 9(B) and thus dismissal under Civ. R. 12(B)(6) is appropriate.

Based upon the case law and the standard for dismissal under Civil Rule 12(B)(6), this Court finds that Plaintiff's claims are insufficient to provide a set of facts upon which Plaintiff may be entitled to relief against Defendants. Therefore, this Court grants Defendants' Motion to Dismiss this action Under Civil Rule 12(B)(6).

ENTER


Patricia S. Oney, Judge

cc:

James McDaniel
1234 Bartlett Building
36 E. 4th Street
Cincinnati, Ohio 45202

Kenneth Ignozzi
131 N. Ludlow Street, Suite 1400
Dayton, Ohio 45402

Judge
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Common Pleas Court
Butler County, Ohio