ORIGINAL

IN THE SUPREME COURT OF OHIO

JULIE VOLBERS-KLARICH	:	**CASE NO. 09-0933**
Appellant	:	**On Appeal from the Butler County Court of Appeals, Twelfth District**
v.	:	
MIDDLETOWN MANAGEMENT, INC.	:	**Court of Appeals Case No. CA2008-07-160**
and	:	
MIDDLETOWN INNKEEPERS, INC.	:	
Appellees	:	

MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEES, MIDDLETOWN MANAGEMENT, INC. AND MIDDLETOWN INNKEEPERS, INC.

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EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

Appellant seeks to have this Court overturn a consistent and well reasoned line of decisions in Ohio regarding the recovery by a consumer of taxes alleged to have been collected either mistakenly or wrongfully by a vendor.

That line of cases holds that the collection and refund of taxes is an exclusive governmental function at all levels: state, county, or municipal. A vendor who collects what purports to be a tax of any kind does so as an agent and trustee of the government. The vendor has a duty to remit any money denominated as a tax to the governmental entity in whose name it was collected, whether or not the amount or the collection itself was proper, even in the circumstance where no such tax exists. Because the government has the exclusive right to any money collected as a tax, a consumer who alleges that she paid an improper tax and attempts to recover it by legal process must seek her refund from the government.

Allowing the consumer to sue the vendor directly for a refund of an improperly paid tax would undermine the government's exclusive claim to the revenue that was collected in its name. Two different parties—the government and the consumer—would have conflicting and simultaneous claims against the vendor for the same funds. That is why the consumer's legal recourse, if any, is against the government. If the government has not in fact received the money from the vendor, it will pursue that claim concomitant with its payment of a refund to the consumer. If this procedure seems unnecessarily circuitous, it is essentially a kind of legal traffic circle designed to avoid a head-on collision between public and private rights.

There is no present impediment to the right of any consumer to recover a tax that she alleges was improper for any reason. Nor is there any impediment to the ability of the government to recover taxes collected in its name but allegedly not remitted to it. This case is not about remedies; it is about procedure only.

Both the trial court and a unanimous Court of Appeals ruled that the Plaintiff in this case already has a clear remedy available to her if the claims that she alleges prove to be true. It is the Plaintiff's attorneys rather than the Plaintiff herself who have an interest in trying to bring a class action against the vendor as opposed to pursuing a claim for a tax refund from the governmental entities. Not a single decision by any lower court in Ohio supports the theory of recovery advanced by the Plaintiff's attorneys in this case. The consuming public whom those attorneys purport to represent is already well served by the existing law, and that is why this case is not of public or great general interest.

STATEMENT OF THE CASE AND FACTS

Middletown Innkeepers, Inc. and Middletown Management, Inc. (referred to hereafter collectively as "Management") are, respectively, the owner and operator of a franchise hotel located in Fairfield, Ohio doing business under the trade name "Hampton Inn." This particular Hampton Inn opened for business in the summer of 1999.

The nominal class action Plaintiff, Julie Volbers-Klarich, purportedly stayed at the Hampton Inn for two nights during August, 2002. [Amended Complaint, ¶ 11]

Although Appellant does not have any documentary evidence of her stay at the Hampton Inn (such as a bill or receipt), she alleges that she was charged an improper amount of taxes for her stay. The exact nature and amount of those alleged charges is unclear because the allegations concerning them vary significantly between the original and amended complaints, and because the Appellant has no tangible evidence of what she alleges she paid.

It should be noted that during oral arguments before the Twelfth District Court of Appeals, the Court chastised Appellant's counsel for repeatedly making allegations for which there is *no evidence whatsoever.* The trial court dismissed this case on the pleadings before there was any discovery at all. Appellant does not have any documentary evidence to support the nominal class representative's own claims much less the claims alleged on behalf of any others. For that reason, all of the allegations concerning what any other patrons of the hotel may have been charged at different times are nothing more than speculation by Appellant's counsel. Unfortunately, the second paragraph of Appellant's Statement of the Case continues in this same vein.

All of the various causes of action pleaded in both the original and amended complaints are based upon the same allegation that Management charged Ms. Volbers-Klarich taxes that it had no right to collect, and that it

has a legal obligation to repay the taxes that it collected to her and to other members of a class alleged to be similarly situated.

ARGUMENTS IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW

I. Appellant Volbers-Klarich's Proposition of Law No. 1: 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."

Contrary to Appellant's assertion that both the trial court and the Court of Appeals misunderstood or misapplied every case in a line of decisions related to this issue, it is clear that both courts understood and followed the consistent logic of those cases. While there is not a large number of these decisions, those that do exist illustrate how a body of case law emerges over time from first principles.

The principle that a party who collects a tax is merely a trustee for the state was set forth by this Court in *Décor Carpet Mills, Inc. v. Lindley.*[1] In that case the carpet seller collected sales tax from its customers that it failed to remit to the state. The opinion in that case noted that even wrongly collected taxes are a "tax collection for the benefit of Ohio."[2]

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[1] *64 Ohio St.2d 152, 413 N.E.2d 833 (1980)*
[2] *Id. at 154-55.*

In *Parker v. Giant Eagle, Inc.,*[3] the Plaintiff attempted to recover directly from the vendor what was alleged to be an improperly calculated sales tax. Citing earlier decisions by the Third, Eighth, and Tenth Districts, the Seventh District Court of Appeals held that the consumer's sole and exclusive remedy was against the State of Ohio, not the vendor. The court said that the result would be the same whether or not the vendor had actually remitted the amounts collected to the State because the vendor had a duty to do so.

When the state legislature subsequently revised R.C. §5739.07 to allow the consumer to *request* a refund from the vendor, this raised the issue of whether or not that change also meant that the consumer could *sue* a vendor who refused that request. In *Bergmoser v. Smart Document Solutions, LLC,*[4] the U.S. District Court for the Northern District of Ohio held that the rationale in *Parker* still applied after the change in the statute. The right to request a refund is not synonymous with a right of action. A consumer does not have a direct action against a vendor who overcharges or wrongfully collects taxes. Only the governmental entity that has an exclusive right to the tax can be required through legal process to make a refund to the consumer.

Barker Furnace Co. v. Lindley,[5] further clarified the point that money collected even for a non-existent tax nevertheless belongs exclusively to the governmental entity in whose name it was collected. That is why the consumer cannot sue the vendor to collect the improperly paid tax. Any such

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[3] *2002 Ohio 5212, 2002 Ohio App. LEXIS 5267 (7th Dist.)*
[4] *2007 U.S. Dist. LEXIS 12224 (N.D. Ohio)*
[5] *1981 Ohio App. LEXIS 13603 (2nd Dist.)*

action would interfere with the government's exclusive claim to the revenue that was collected in its name. That is why the consumer is required to claim the money from the government as a tax refund. When Appellant says that Butler County and Fairfield Township do not have any of the money alleged to have been collected as a tax, she is alleging something that is irrelevant to the applicable law. The county and the municipality have both the power and the exclusive right to pursue a claim for those moneys against the vendor. If the Appellant makes a successful claim for a refund, then the county or the municipality can recover that amount from the vendor as well as any other amounts not yet remitted.

Finally, in *City of Findlay v. Hotels.com, L.P.,*[6] the question arose as to whether the applicable principle of law is any different if the tax is one levied by a municipal entity as opposed to the state government. The U.S. District Court for the Northern District of Ohio held that the same rule applies. Any funds collected in the name of a local governmental entity are also the exclusive property of that entity and may not be recovered by a consumer directly from the vendor. The consumer must recover any erroneous or unwarranted payment from the governmental entity, and it is up to that entity to pursue the vendor if the tax has not yet been remitted. The court held that the City of Findlay had stated a valid claim for conversion of taxes collected in its name and not turned over to it by a number of online companies. The City of Findlay not only had a valid claim against those defendants; it had an *exclusive* claim.

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[6] *441 F.Supp.2d 855, 2006 U.S. Dist. LEXIS 50879 (N.D. Ohio)*

The Appellant attempted to defeat an initial motion to dismiss in the trial court by changing the allegation in an Amended Complaint from one of a state sales tax to a county or municipal excise tax. In the end, though, both the trial court and the Court of Appeals held that the legal principle is the same whether the tax at issue was a sales tax or an excise tax, and whether the taxing authority was the state government, the county, or a municipality. In each case the purported tax is the exclusive property of the governmental entity in whose name it was collected by virtue of being denominated as such, whether or not it has been remitted by the vendor, and the consumer's only legal recourse is a claim for a refund directed to the government.

II. Appellant Volbers-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.

Appellant's claim under the Ohio Consumer Sales Practices Act was just one of seven different claims in both the original and amended complaints. Each of these alleged multiple causes of action was simply a restatement of the original claim for the improper collection of a tax.

To the original claim of charging a non-existent tax, the OCSPA claim merely appended the term "fraudulently." Both the trial court and the Court of Appeals correctly noted that if the consumer's exclusive legal recourse for a refund of an improperly collected tax lies in an action against the governmental entity in whose name the tax was collected, that principle cannot be evaded by the simple expedient of throwing the term "fraud" into the mix.

In order to have a private right of action under R.C. §1345.09, a consumer must demonstrate that she has suffered actual damages.[7] If the consumer has no right of action against a vendor for taxes alleged to have been wrongly collected, but does have a right to claim a refund from the governmental entity, then she has not suffered damages as a result of the vendor's actions. Any other holding would simply nullify the entire line of cases beginning with *Décor Carpet, supra.*

As the Court of Appeals noted, "[w]hile 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."

The Court of Appeals also agreed with the trial court that Appellant's complaint was defective as a purported class action under the OCSPA because she failed to plead the requirements of a class action pursuant to R.C. § 1345.09(B).

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

While the trial court dismissed Appellant's fraud claim for lack of specificity, the Court of Appeals noted that the basic problem with this claim is identical to the problem with the OCSPA claim. Once it has been

[7] *Burdge v. Supervalu Holdings, Inc., 2007 Ohio 1318, 2007 Ohio App. LEXIS 1265 (1st Dist.)*

established that the Appellant's proper remedy lies in making a tax refund claim with the governmental entity, that legal principle cannot be converted into a claim against the vendor by the mere expedient of calling the tax collection "fraudulent." The Court of Appeals correctly held that the Appellant's sole cause of action and remedy is to seek a refund from the taxing entity.

Presumably, Ms. Volbers-Klarich believes that she is entitled to a tax refund and would be satisfied to obtain it from any source. The same would presumably be true of any other putative claimants that might exist. It is the Appellant's *attorneys* who have their sights set on something far more ambitious than their nominal client's potential recovery.

CONCLUSION

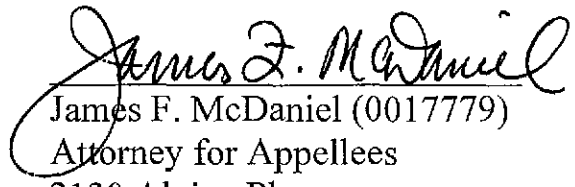
The proposition of law that governs Appellant's claims is quite simply stated:

1. The money that is collected by a vendor as a purported tax of any kind—sales tax, excise tax, or lodging tax—belongs exclusively to the governmental entity in whose name it was charged by virtue of that fact alone. The party who paid the purported tax has no legal claim to recover it from the vendor.

2. That remains true whether or not the vendor has actually paid the money over to the governmental entity in whose name it was collected.

3. The only claim that the consumer has for the recovery of an improper or excessive tax payment is against the governmental entity in whose name it was collected, not against the party who actually charged the purported tax.

4. That public policy in support of the government's exclusive tax powers cannot be thwarted or evaded by the simple expedient of calling the claim by another name such as negligence, breach of statutory duty, or fraud.



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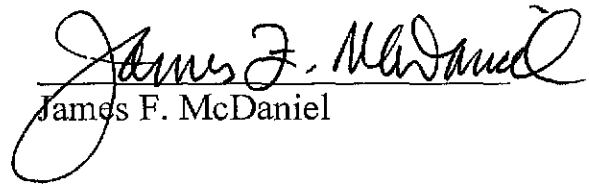
Certificate of Service

I hereby certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction was served on Kenneth J. Ignozzi, Attorney for Appellant, Dyer, Garofalo, Mann, & Schultz, 131 N. Ludlow Street, Suite 1400, Dayton, OH 45402, by ordinary U.S. Mail, postage prepaid, this 11th day of June, 2009.



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