

ORIGINAL

IN THE SUPREME COURT OF OHIO

**Appeal Number 2009-0933
Butler County Court of Appeals, Twelfth Appellate District
Court of Appeals Number CA2008-07-160**

JULIE VOLBERS-KLARICH, Appellant,

v.

**MIDDLETOWN MANAGEMENT, INC. and MIDDLETOWN
INNKEEPERS, INC., Appellees.**

**MERIT BRIEF OF APPELLEES MIDDLETOWN MANAGEMENT,
INC. and MIDDLETOWN INNKEEPERS, INC.**

James C. Frooman (0046553)
Atty of Record
Douglas R. Dennis (0065706)
FROST BROWN TODD, LLC
2200 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202
Phone: (513) 651-6800
Fax: (513) 651-6981
*Counsel for Appellees
Middletown Management, Inc. and
Middletown Innkeepers, Inc.*

Kenneth J. Ignozzi (0055431)
Dyer, Garofalo, Mann & Schultz
131 N. Ludlow Street
Suite 1400
Dayton, Ohio 45402
(937) 223-8888
*Counsel for Appellant
Julie Volbers-Klarich*

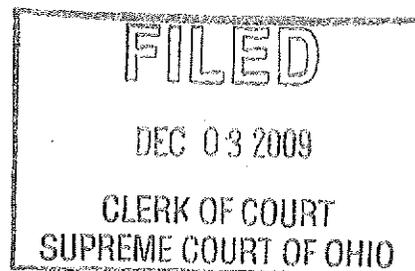


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STATEMENT OF POSITION

Plaintiff-Appellant claims that Middletown Innkeepers, Inc. and Middletown Management, Inc. (referred to hereafter collectively as “MMI”) charged her for non-existent taxes and that she is entitled to a direct action against MMI for a refund of her tax payment. But, Ohio courts have consistently held that taxpayers can only seek a refund of wrongfully paid taxes from the government entity in whose name the taxes were collected. Applying this rules of law to the facts of this case, the trial court properly dismissed this case on the pleadings under Rule 12, and the Twelfth District Court of Appeals affirmed.

STATEMENT OF THE CASE AND FACTS

MMI are, collectively, the owner and operator of a franchise hotel located in Fairfield, Ohio doing business under the trade name “Hampton Inn.” This Hampton Inn opened for business in the summer of 1999. The nominal class action Plaintiff-Appellant, Julie Volbers-Klarich, claims that she 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. Her allegations regarding the taxes that she was charged vary significantly between the original and amended complaints, largely because the Appellant has no tangible evidence of what she paid.

All of the various causes of action pleaded in both the original and amended complaints are based upon the same allegation that MMI 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. Because taxpayers can only seek a refund of wrongfully paid taxes from the government in whose name the taxes were collected, the trial court dismissed this case on the pleadings under Rule 12, and the Twelfth District Court of Appeals affirmed. As a result, review of this case should remain on the failure of the pleadings to state a case and not on subsequent allegations by the Appellant.¹

ARGUMENTS IN OPPOSITION TO
APPELLANT'S PROPOSITIONS OF LAW²

I. Levying, collecting, and refunding taxes are exclusive government functions. A taxpayer who alleges that she paid a tax that was improper for any reason must seek a refund from the government entity in whose name the tax was collected

A. Introduction

The case is about whether a taxpayer who alleges that she was charged a non-existent tax can recover directly from the vendor who charged the tax. The

¹ 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*. Appellant does not have any documentary evidence to support her own claims much less the claims alleged on behalf of any others as the nominal class representative. For that reason, all of the allegations concerning what any other patrons of the hotel may have been charged at different times are sheer speculation by Appellant's counsel.

² Dismissal of an Amended Complaint under Rule 12 is reviewed *de novo*. *State ex rel. Hanson v. Guernsey Cty. Bd. Of Commrs.* (1992), 65 Ohio St.3d 545, 1992-Ohio-73, 605 N.E.2d 378.

Plaintiff-Appellant alleges that MMI charged her non-existent excise taxes in the name of Butler County and the City of Fairfield, Ohio when she rented a room at the hotel in Fairfield sometime in August 2002.

Accepting the allegations of the First Amended Complaint as true for purposes of the Motion to Dismiss, the issue is then whether those allegations state a claim upon which relief can be granted against MMI. Appellant seeks to recover from MMI amounts that were purportedly collected as taxes for the benefit of Butler County and the City of Fairfield.

B. Taxpayers can only seek a refund of wrongfully paid taxes from the government in whose name the taxes were collected

There is a modest line of cases that are relevant to this issue. The common thread that unites all of these cases is the principle that the levying, collecting, and refunding of taxes constitute the exercise of an exclusive government function.³ Ohio courts have consistently protected the exclusive nature of that right. Only governments can levy and collect taxes. Any money collected as a tax in the name of a government entity belongs to that government entity *ipso facto*. Only governments can collect taxes, and only governments can be required by legal process to refund taxes that were wrongly paid by individual taxpayers.

³ *Neil v. Barron* (1898), 8 Ohio Dec. 124.

A vendor, such as MMI, who collects a tax, is merely a trustee for the state. *Décor Carpet Mills, Inc. v. Lindley*.⁴ In *Décor Carpet Mills, Inc.*, a carpet seller collected sales tax from its customers that it failed to remit to the state. The Court's opinion in that case noted that even wrongly collected taxes are a "tax collection for the benefit of Ohio."⁵ As noted by the Twelfth District Court of Appeals in the present case, *Décor Carpet Mills, Inc.* stands for the proposition that any overpayment of taxes collected on behalf of the state belong to the state since the party collecting the taxes is merely a trustee of those funds.

One year later this Court decided *Geiler Co. v. Lindley*⁶, which cited and affirmed *Décor Carpet Mills, Inc.* *Geiler* held that a vendor who collected a non-existent sales tax had to turn that money over to the state in whose name it had been collected and was not entitled to an offsetting credit for the use tax that it had paid instead.

In *Parker v. Giant Eagle, Inc.*⁷, the plaintiff attempted to recover directly from the vendor what was alleged to be an improperly calculated sales tax. Ms. Parker alleged that she had made purchases at a Giant Eagle store. She said that she had presented coupons to the cashier in order to take advantage of the store's policy of offering an enhanced "double coupon" discount. She argued that the

⁴ (1980), 64 Ohio St.2d 152, 413 N.E.2d 833.

⁵ *Id.* at 154-155.

⁶ (1981), 66 Ohio St.2d 514, 423 N.E.2d 134.

double coupon amount should have been deducted from her total grocery bill prior to calculating the sales tax. She maintained that Giant Eagle instead charged sales tax on the undiscounted total of her purchases. Her complaint against the vendor—just like the First Amended Complaint in the present case—alleged negligence, breach of contract, and dereliction of a statutory duty to collect the correct amount of sales tax. Ms. Parker demanded damages against the vendor, as does Plaintiff in this case.

Citing earlier decisions by the Third, Eighth, and Tenth Districts, the Seventh District Court of Appeals held in *Parker* 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:

If Appellee did collect an excessive sales tax, it had a duty to remit that excess to the state for the exclusive benefit of the state. See R.C. 5739.01. If Appellee did remit the excess sales tax, only the state could ultimately be required to refund the excess. If Appellee did not remit it, the state nevertheless has a right to receive those funds. The state's right to receive those funds may be hindered or precluded if Appellant obtains a monetary judgment for those funds in a forum apart from the Court of Claims. Therefore, Appellant's request for monetary damages is an attempt to get at funds either already possessed by the state or owed to the state, and such a claim must be brought in the Court of Claims.⁸

⁷ 2002-Ohio-5212.

⁸ *Id.* at *11.

The rationale stated in *Parker* is the same one that runs throughout this entire line of cases. The consumer cannot interfere with the government's exclusive right to a collected tax, and the vendor who collected the tax should not be exposed to competing claims for the same amount of money. The government is the only one with a claim against that vendor for a tax that has been collected in that government entity's name, and the government is the only source for a consumer seeking a refund of a tax that was wrongly paid.

Part of the logic of the *Parker* decision was based on the court's perception that the legislature never intended to give the consumer a direct cause of action against a vendor as trustee of the tax funds as opposed to the state. The court noted that the applicable statute and the Administrative Code specifically limited the consumer's options:

The revised version of R.C. 5739.07 continues to prevent most consumers from requesting a sales tax refund directly from the tax commissioner unless the consumer paid the sales tax directly to the state rather than to a vendor.⁹

Importantly, a consumer has a remedy. In cases where a consumer seeks a refund for state taxes, the consumer can file an action with the Court of Claims. *Drain v. Kosydar* (1978), 54 Ohio St.2d 49, 54-55, 3741N.E.2d 1253, (absent a specific administrative remedy in R. C. 5739.07, a plaintiff could file a suit with the Court of Claims to recover funds from the State of Ohio). The reason that the

complaint must be filed with the Court of Claims is because the State of Ohio has consented to be sued for damages only in actions filed in the Court of Claims.¹⁰

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 also *sue* a vendor who refused that request. But in *Bergmoser v. Smart Document Solutions, LLC*,¹¹ 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:

Plaintiffs would like the Court to allow their claims to remain solely because the code allows a consumer to “request a refund from the vendor.” However, Plaintiffs choose to overlook the very next paragraph that would require them to file an application with the tax commissioner if the vendor denied their request. Notwithstanding that Plaintiffs did not request a refund from Defendant, their claims to seek a refund through private litigation are seemingly prohibited by the very section of the code to which they cite. And, as Defendant aptly notes, the reason for the State of Ohio’s requirement that a consumer file an application with the tax commissioner is sound because “it is ultimately the state’s treasury that will be affected if [Plaintiffs’] suit for monetary damages is successful.”¹²

Bergmoser made it clear that the rule in *Parker* applies whether or not the vendor has actually turned over the money that it had collected to the government entity. Collecting money in the name of the state creates a legal obligation on the part of the vendor/collector to turn that money over to the state. If the vendor

⁹ *Id.*

¹⁰ *Parker, supra*, at *11.

¹¹ (N.D. Ohio Feb. 22, 2007), 2007 U.S. Dist. LEXIS 12224, *aff’d* (6th Cir. 2008), 268 Fed. Appx. 392.

fails to do so—as Plaintiff alleges in the present case—then the state has a claim that it can bring against the collector. It does not change the rule that the consumer has to file her claim against the government, not against the vendor collecting the tax.

Barker Furnace Co. v. Lindley,¹³ further clarified the point that money collected even for a non-existent tax nevertheless belongs exclusively to the government entity in whose name it was collected:

The Tax Commissioner concedes that the underlying contractor-consumer transaction was nontaxable under the statute. The Commissioner argues, however, in such a situation the party charging and collecting the tax (which has no legal existence) under the apparent authority of state law, may not thereafter keep the amount collected for the reason that the collection was erroneous. We find ourselves in agreement with the Tax Commissioner.¹⁴

If even an erroneously collected tax belongs to the government entity in whose name it was collected, then no third party can be allowed to make a claim directly against the vendor for the same amount:

The tax also so collected and subject to remission may not be regarded as part of the price; it is a "tax collected for the benefit of the state...and...no person other than the state...shall derive any benefit from the collection of payment of such tax. *Ohio Rev. Code Section 5739.01(H)*.¹⁵

That is why the consumer cannot sue the vendor to collect the improperly paid tax. Any such action would interfere with the government's exclusive claim

¹² *Bergmoser* at *6-7, citing *Parker v. Giant Eagle, Inc.*, 2002-Ohio-5212.

¹³ (June 2, 1981), Montgomery App. No. 6813, 1981 Ohio App. LEXIS 13603.

¹⁴ *Id.* at *8.

¹⁵ *Id.* at *7.

to the revenue that was collected in its name. Accordingly, the consumer is required to claim the collected taxes from the government as a tax refund.

When Appellant says that Butler County and Fairfield Township do not have any of the allegedly collected taxes, she is alleging something that is irrelevant to the applicable law. The county and the municipality have both the power to tax and the exclusive right to pursue a claim against a vendor for collected taxes. If the Appellant makes a successful claim for a tax refund, then the county or the municipality can recover that tax refund from the vendor who collected those taxes as well as any other taxes collected but not yet remitted.

C. The Result In This Case Is the Same Whether the Tax is a State Sales Tax or a Municipal Excise Tax

Appellant has repeatedly argued that *Parker* has no relevance to the present case because it involved a state sales tax as opposed to a county or municipal excise tax. But that misses the point. The relevant issue is the *public policy* that was articulated as the basis for the decision in *Parker*. The *Parker* court stated that any money collected as a tax belongs to the government entity in whose name it was collected just by virtue of that fact. Therefore, that government entity has the exclusive right to obtain that tax from the vendor who collected it, and no private citizen can be allowed to assert a claim against the vendor for the same collected taxes because that tax money already belongs to the state whether or not it has been delivered to the government entity. In the words of the court, “[t]he state’s

right to receive those funds may be hindered or precluded if Appellant obtains a monetary judgment for those funds...” The private consumer’s exclusive recourse is against the government entity that will end up with that tax money in its coffers:

Although Appellant has attempted to frame her suit as a direct action against Appellee [vendor] only, it is the state's treasury which will ultimately be affected if Appellant's suit for monetary damages is successful.¹⁶

Appellant’s claim is that all of the preceding cases are distinguishable from hers because all of them dealt with state sales and uses taxes. She argues that an excise tax is different than a sales tax, and that the public policy that the collection and refunding of taxes are exclusive government functions does not apply to government at the county or municipal level. The State of Ohio levies a sales tax on the sale of a hotel room, and the county and city levy an excise tax on the same transaction. At no point does Appellant even attempt to explain why the public policy already well established in the case of the state sales tax is different when applied to a different government level.

In *City of Findlay v. Hotels.com, L.P.*,¹⁷ the U.S. District Court for the Northern District of Ohio held that local governments have both the power and the exclusive right to pursue a claim for collected taxes against the vendor if they are in fact owed. In this case, the City of Findlay, Ohio brought suit against a number

¹⁶ *Id.*

¹⁷ (N.D. Ohio 2006), 441 F.Supp.2d 855.

of online travel companies that had marketed hotel rooms on the Internet. These companies would purchase hotel rooms in bulk at discounted rates and then resell them to consumers at marked up prices. The companies charged their customers sales and excise taxes based on the marked up rates but remitted to the city an excise tax on the original discounted rates at which the companies had purchased the rooms. The companies then pocketed the difference in the two taxes.

Citing *Barker Furnace, supra*, the District Court held that any funds collected in the name of a local government 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 government entity, and it is up to that government entity to pursue the vendor if the tax has not yet been remitted. The City of Findlay not only had a valid claim against those defendants; it had an *exclusive* claim, just as the State of Ohio had an exclusive claim in the *Parker* case.

In response to an initial motion to dismiss in the trial court in this case, Appellant changed the allegation in the 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 government 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 refund from the government.

II. The public policy that requires a taxpayer to claim an excise tax refund from the government rather than the vendor who collected it cannot be evaded by the mere restatement of the same claim as a different cause of action

Appellant's refund claim in both the original and amended complaints was actually stated as seven separate causes of action, fraud, breach of duty to collect taxes, negligence, breach of contract, conversion, violation of OCPA and violation of OCSPA. Each of these claimed multiple causes of action simply incorporated by reference the same factual allegations regarding the improper collection of a tax that did not exist. In each case the allegations were identical; it was only the legal characterization that changed. For example, 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 government entity in whose name the tax was collected, that public policy cannot be evaded by the simple expedient of throwing the term "fraud" into the mix. Any other holding would simply nullify the entire line of cases beginning with *Décor Carpet Mills, Inc., supra*.

As the Court of Appeals in the case at bar noted in its opinion, “[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).

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 established that the Appellant’s proper remedy lies in making a tax refund claim with the government 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.

CONCLUSION

Accordingly, the propositions of law that govern Appellant's claims are:

Proposition of Law No. 1. Levying, collecting, and refunding taxes are exclusive government functions. A taxpayer who alleges that she paid a tax that was improper for any reason must seek a refund from the government entity in whose name the tax was collected.

Proposition of Law No. 2. The public policy that requires a taxpayer to claim an excise tax refund from the government rather than the vendor who collected it cannot be evaded by the mere restatement of the same claim as a different cause of action.

Douglas R. Dennis on authority SPW (0068176)
James C. Frooman (0046553)
Atty of Record
Douglas R. Dennis (0065706)
FROST BROWN TODD, LLC
2200 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202
Phone: (513) 651-6800
Fax: (513) 651-6981
Counsel for Appellees
Middletown Management, Inc. and
Middletown Innkeepers, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellees 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 3rd day of December, 2009.