

ORIGINAL

IN THE SUPREME COURT OF OHIO

Julie Volbers-Klarich, : Case No. 2009-0933  
Plaintiff-Appellant, :  
v. :  
Middletown Management, Inc., et al., :  
Defendants-Appellees. :

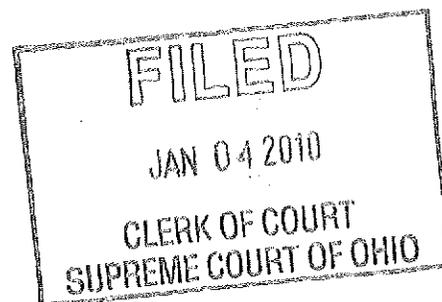
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REPLY BRIEF OF PLAINTIFF-APPELLANT, JULIE VOLBERS-KLARICH

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## INTRODUCTION

According to the Appellate Court and the Appellees, an Ohio vendor may defraud and steal from consumers without liability simply by claiming to be collecting a fictitious 'tax.' That is exactly what Middletown Management, Inc. and Middletown Innkeepers, Inc. (collectively "Defendants-Appellees") did in this case. Defendants-Appellees own a Hampton Inn hotel in Fairfield, Ohio. Plaintiff-Appellant, Julie Volbers-Klarich ("Volbers-Klarich"), and her family stayed at this Hampton Inn hotel in August of 2002. As part of the charge for her stay, Defendants-Appellees fraudulently charged Volbers-Klarich for non-existent excise 'taxes' and kept for themselves the money, which they obtained from this deception. For over seven years, Defendants-Appellees deceived and defrauded unknowing travelers who stayed at their hotel by charging them with fake and nonexistent 'taxes.'

Defendants-Appellees allege in their Brief, and the Appellate Court below incorrectly held, that the statutory framework involving the collection of taxes does not provide for a direct action by Volbers-Klarich and others similarly situated against Defendants-Appellees. Instead, the Defendant-Appellees incorrectly argue that Volbers-Klarich's only recourse is to seek a refund from the governmental entity under which the Defendant-Appellees charged the non-existent excise taxes. However, as set forth in Volbers-Klarich's Brief and herein, this holding is incorrect according to Ohio law. Volbers-Klarich may bring a direct action against Defendant-Appellees for their fraudulent collection of non-existent taxes, which they basically stole from their unsuspecting customers and converted to their own use. The Defendants-Appellees cannot hide behind the statutory framework set up for the collection of taxes in order to avoid their liability to Volbers-Klarich and others similarly situated for their fraudulent acts and violations of

the Ohio Consumer Sales Practice Act in the collection of the non-existent excise taxes. The Appellate Court's decision should, therefore, be reversed.

## ARGUMENT

### **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 that the Company Claims Imposed the "Tax".**

The Defendant-Appellees allege in their Brief that Volbers-Klarich's claims against Defendants-Appellees should be dismissed because Volbers-Klarich cannot maintain a direct action against Defendants-Appellees, but instead must bring an action against the taxing entity pursuant to R.C. 5739.01 et seq. In arriving at this incorrect conclusion, the Defendant-Appellees cite to *Parker v. Giant Eagle*, Seventh Dist. No. 01 C.A. 174, 2002-Ohio-5212 and *Bergmoser v. Smart Document Solution* (N.D. Ohio Feb. 22, 2007), U.S. Dist. Court No. 1:05CV2882, 2007 WL 634674, affirmed by *Bergmoser v. Smart Document Solutions, LLC* (C.A.6 2008), 268 Fed.Appx. 392, 2008 WL 624848 . However, *Parker* and *Bergmoser* deal with different issues and the Defendant-Appellees, like the Appellate Court, has 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. Thus, *Parker* deals with the mistaken charging of an incorrect amount of State sales tax. Likewise, *Bergmoser* addressed the improper

collection of State sales tax. While the reasoning in *Parker* and *Bergmoser* may be proper in that scenario, this reasoning, however, does not apply to the case at bar because it is regarding the purported collection of municipal and county excise taxes, not State sales taxes.

Contrary to the arguments of Defendant-Appellees, an important difference between *Parker* and *Bergmoser* 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 of 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 to the State. This section, however, only deals with sales taxes. It says nothing about collecting excess excise taxes and remitting them. In fact section E is specifically discussing “tax collection for the benefit of the state.” Taxes collected pursuant to R.C. 5739.08 are not to 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 collected funds 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, nor is there a duty to remit these funds to the State. 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* and *Bergmoser* relied upon Ohio Administrative Code 5703-9-07, 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 5703-9-07 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 5703-9-07 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. They 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.

Further, 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 what was actually a non-existent tax. 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.

In their Brief, the Defendant-Appellees agree with the Appellate Court's Decision 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, as set forth in above and in Volber-Klarich's Brief, this is incorrect. The main basis for the Appellate Court's Decision was the *Parker* decision. But, *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 intentionally devised a deceptive 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 are not

in a position to offer a refund. This is a 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 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.**

The Defendant-Appellees also incorrectly argue in their Brief that Volbers-Klarich does not have a proper claim against Defendants-Appellees under the Ohio Consumer Sales Practices Act. In addition to her claim for improper collection of taxes, Volbers-Klarich also brought a claim against Defendants-Appellees under the Ohio Consumer Sales Practices Act ("CSPA"). The purpose of CSPA 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. As Defendants-Appellees deceived consumers into paying funds for a fictitious 'tax,' Volbers-Klarich is entitled to bring a claim pursuant to this Act.

Further, in order to be a consumer to bring a claim pursuant to the CSPA, one must be an "individual." R.C. 1345.09; *Watkins & Sons Pet Supplies v. Iams, Co.* (S.D. Ohio 1999), 107 F.Supp.2d 883. Neither a county nor a city are individuals under the CSPA and neither is therefore entitled to bring a claim under the CSPA. *Id.* It follows that neither Butler County nor the City of Fairfield is entitled to bring a claim against Defendants-Appellees under the CSPA.

Only Volbers-Klarich as an individual consumer can bring a claim against Defendants-Appellees for violation of the CSPA and this claim was, therefore, improperly dismissed.

Further, the purpose of the CSPA of protecting consumers from unfair, deceptive, and unconscionable acts and practices is best served by allowing Volbers-Klarich's CSPA 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 CSPA was designed to protect against. Therefore, because it would also further the designated purpose of the CSPA of protecting individual consumers from deceptive acts by vendors, Volbers-Klarich's CSPA claim should not have been dismissed and the Appellate Court erred in affirming the Trial Court's Decision to dismiss these claims.

**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.**

The Defendant-Appellees also incorrectly argue in their Brief that the Appellate Court properly affirmed the dismissal of Volbers-Klarich's fraud claims against the Defendant-Appellees. While the trial court determined that Volbers-Klarich's fraud claim was not pled with sufficient particularity, the Appellate Court merely cited to *Bergmoser*, supra and stated that this claim was dismissed because the "remedy, for any collection of improper taxes, is filing an application for a refund from the taxing entity." However, as stated in Volbers-Klarich's original Brief and above, *Bergmoser* specifically relied upon an Administrative Code section, OAC 5703-9-07, that does not apply to this action in reaching this conclusion. Thus, the Appellate Court

was wrong to rely upon it in this case.

Moreover, when the *Bergmoser* decision was appealed to the Sixth Circuit, the Sixth Circuit, did not use the above rationale to dismiss the fraud claims as it did the CSPA claims. *Bergmoser v. Smart Document Solutions, LLC* (C.A.6 2008), 268 Fed.Appx. 392, 2008 WL 624848. On the contrary, the Sixth Circuit analyzed whether the fraud claims were pled with sufficient particularity. *Id.* at 395-396. Thus, the Sixth Circuit acknowledged that the Administrative Code's section's language that provided a remedy for a refund did not bar a plaintiff from bringing a claim for fraud. Therefore, the Appellate Court's reliance upon *Bergmoser* was misplaced.

If this Court accepts the Defendant-Appellees' argument regarding the fraud claim not being viable simply because the fraud occurred under the guise of a non-existent tax, then it has prescribed a manner for deceptive companies and individuals to take advantage of Ohioans. Any unscrupulous vendor will then be able to charge fictitious 'taxes' on consumers and escape liability so long as they label the fraudulent charge a "tax". The tortfeasor could merely point to OAC 5703-9-07, and have any claim against them dismissed. The mere title a tortfeasor chooses to hide their fraud behind should not remove them from liability.

Yet, Defendant-Appellees argues that Ohio public policy actually supports allowing this deception. Surely, Ohio's public policy cannot favor allowing its citizens to be deceived into paying fictitious charges to a tortfeasor so long as the tortfeasor claims the charges are a "tax" and then prohibit them from seeking recourse for this fraud from the tortfeasor. Likewise, it cannot be Ohio's public policy to make political subdivisions liable for fictional "taxes" that criminals and tortfeasors impose on Ohio's unwitting citizens. Rather, Ohio public policy should

favor just the opposite. When a party fraudulently steals money from consumers, the consumer must be permitted to bring a claim against the tortfeasor to recover damages from the fraud, regardless of how the fraud is committed. Thus, Volbers-Klarich should be permitted to bring a claim for fraud.

Further, Volbers-Klarick did set forth a valid fraud claim in her complaint. 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.

As set forth in detail in Volbers-Klarich's Brief, Volbers-Klarich has clearly set forth her claim for fraud with sufficient particularity to survive a motion to dismiss. First, she stated 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. (Supp. at 2-3,7-8). 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. *Id.* 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. (Supp. at 7-8).

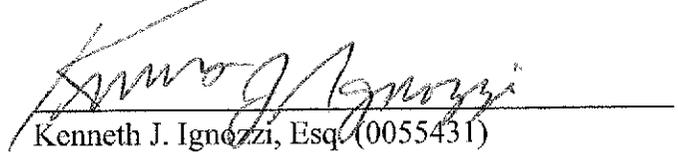
Presuming all of the factual allegations in the Amended Complaint are true and viewing them in a light most favorable to Volbers-Klarich, she has undoubtedly set forth her fraud claim against Defendants-Appellees with sufficient particularity to put Defendants-Appellees on notice of the claim and to 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. The mere fact that 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 forgoing reasons, as well as those set forth in Volbers-Klarich's original Brief, the Appellate Court erred when it affirmed the Trial Court's Decision granting Defendants-Appellees' Motion to Dismiss Volbers-Klarich's Amended Complaint for failure to state a claim and Volbers-Klarich, therefore, respectfully requests that the Appellate Court's Decision be reversed.

Respectfully submitted,

**DYER, GAROFALO, MANN & SCHULTZ**

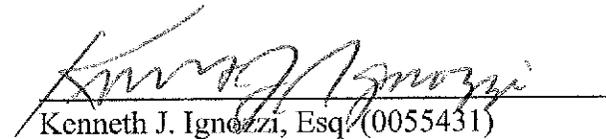


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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon the following by regular U.S. mail, postage paid, this 4<sup>th</sup> day of January, 2010.

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