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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2023-000442

Mark Gregory Thompson and Jane Page Thompson, individually and on behalf of all those similarly situated, Appellants,

v.

Clay Killian, in his official capacity as Aiken County Administrator, Jason Goings, in his official capacity as Treasurer of Aiken County, Aiken County Council, Aiken County, City of Aiken, Aiken Council, and Stuart Bedenbaugh, in his official capacity as City Manager of Aiken, Respondents.

APPELLANTS' RESPONSE BRIEF TO AMICUS CURIAE BRIEF OF BEAUFORT COUNTY

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STATEMENT OF THE FACTS

Appellants rest upon the statement of the facts set forth in their final brief.

ARGUMENT

Appellants Mark Gregory Thompson and Jane Page Thompson, pursuant to Rule 213 of the South Carolina Rules of Appellate Procedure, submit this Response to the Amicus Curiae brief filed on behalf of Beaufort County. The issues presented in this appeal concern illegal Road Maintenance Fees charged by Respondent Aiken County and Respondent City of Aiken to their citizenry. Road Maintenance Fees, like those at issue in this appeal, are being challenged in circuit courts across the State. These fees are virtually identical to the one struck down in Greenville County by the South Carolina Supreme Court in *Burns v. Greenville County Council*, 433 S.C. 583, 590 (2021). There, Justice Kittredge cautioned political subdivisions that "[g]oing forward, courts will carefully scrutinize so-called 'service or user fees' to ensure compliance with section 6-1-300(6)." *Burns*, 433 S.C. at 590 (J. Kittredge, concurring). Bottom line: **these fees are illegal**. The fees charged and collected by Respondent Aiken County for decades and Respondent City of Aiken since 2016 are invalid, illegal, and must be returned to the citizenry.

The Amicus Brief broadly asserts that the "the pending cases have little in common with the *Burns* case and pose an unjustified and reckless threat to the financial stability of impacted counties." Am. Br. at p.7. This statement is first, incorrect, and second, shows that Beaufort County and its fellow political subdivisions charging these illegal fees care more about financial risk than returning to their citizens the millions of ill-gotten fees they have collected for decades. In 2021-2022 alone, Respondent Aiken County took in approximately $4 million in road maintenance fees. Appellants find some irony in Beaufort County's justification for their retention of these fees: "South Carolina residents do not want their roads to fall into disrepair." Am. Br. at p.9.

Nevertheless, no argument raised before the lower court, and now in the Amicus Brief, warranted the dismissal of Appellants' Complaint. This Response will address new arguments raised by the Amicus Brief, and resist revisiting issues already substantially briefed before this Court.

I. Road Maintenance Fees enacted prior to December 31, 1996, must meet the requirements of S.C. Code Ann. § 6-1-300(6) and cannot be "grandfathered" into validity.

The Amicus Brief misreads *Burns* and creates a legal fiction arguing that any road fee enacted before 1997[1] is "statutorily grandfathered" into validity pursuant to S.C. Code Ann. § 6-1-330(A)[2] and *Brown v. County of Horry*, 308 S.C. 180, 181, 182, 417 S.E.2d 565, 566 (1992). Therefore, according to the Amicus Brief, the road maintenance fees enacted prior to 1997 would be "insulated from" the *Burns* decision. *See* Am. Br. at pp. 9-11. But this is not an either / or test as the Amicus Brief assumes. Our Supreme Court is clear in *Burns* that all these fees "arguably must meet the requirements we set forth in *Brown* but **certainly must** meet the requirements the General Assembly set forth in subsection 6-1-300(6)." *Burns*, 433 S.C. at 587 (emphasis supplied). These fees certainly do not.

A. This argument was not raised and ruled upon by the lower court and is therefore outside the scope of the issues on appeal.

At the outset, the "grandfathered in" argument was not raised and ruled upon by the lower court. Therefore, this argument is outside the scope of the issues on appeal and cannot be considered by the Court. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon

[1] 1997 is the year that S.C. Code Ann. § 6-1-300(6) went into effect.

[2] Section 6-1-330(A) states, in part: "A fee adopted or imposed by a local governing body prior to December 31, 1996, remains in force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this article."

by the trial [court]."); *id*. at 142, 587 S.E.2d 693–94 ("Issues not raised and ruled upon in the trial court will not be considered on appeal.").

B. This argument cannot apply to the City of Aiken Road Maintenance Fee because it was enacted in 2016.

This argument cannot apply to the City of Aiken's Road Maintenance Fee because it was enacted in 2016.[3] *See* Brief of Respondents at p.1. This road maintenance fee, like the fee at issue in *Burns*, cannot satisfy the requirements of section 6-1-300(6), and is therefore invalid and illegal.

C. The Aiken County Road Maintenance Fee cannot be "grandfathered in" to validity.

The Amicus Brief's argument directly conflicts with controlling precedent. The Greenville County road maintenance fee and the Aiken County road maintenance fee were each enacted **prior to** 1997. *See* Am. Br. at p. 11, n.2 ("The Supreme Court in *Burns* appears to have assumed (without finding) that the Greenville County road fee was imposed after December 31, 1996."). The *Burns* court explicitly recognized that Greenville County's road maintenance fee was enacted in 1993 as well, thus completely undermining the Amicus Brief's grandfather clause argument. Indeed, this was specifically recognized by the Supreme Court in the first few sentences of the *Burns* opinion, and the Court still struck down the road maintenance fee because it failed to meet the requirements the General Assembly set forth in subsection 6-1-300(6). *Burns*, 433 S.C. at 587 ("Ordinance 4906 amended Ordinance 2474—**enacted in 1993**….") (emphasis supplied).

Essentially, the Amicus Brief calls for this Court to ignore both the General Assembly and South Carolina Supreme Court precedent when arguing that the road fees enacted prior to 1997 need only comply with the requirements set forth in *Brown v. County of Horry*, 308 S.C. 180, 181,

[3] And repealed in 2021 as an implied admission.

182, 417 S.E.2d 565, 566 (1992). This is wrong. Applying *Burns*, these fees are invalid, illegal, and cannot be "grandfathered in." Under the law of South Carolina, there can be no other result.

Moreover, since 1997, Aiken County has amended its road maintenance fee to increase the illegal charge (the fee was $15 in 1992 and is $25 today). Therefore, assuming *arguendo* the supposed "grandfather clause" did once apply, when Aiken County Council passed an ordinance changing the dollar amount after 1997, the road maintenance fee became subject to section 6-1-300(6). Road Maintenance Fees enacted prior to December 31, 1996, "arguably must meet" the requirements set in *Brown v. County of Horry*, and "certainly must meet" the requirements of S.C. Code Ann. § 6-1-300(6). *See Burns supra*. These fees cannot be "grandfathered" into validity. Section 12-60-80 does not bar this action.

The arguments related to section 12-60-80(C) have already been raised and briefed *ad nauseam* before this Court. For the reasons stated in Appellants' Brief and Reply Brief, section 12-60-80 does not bar this action, and the lower court erred when it applies this statute to dismiss this action.

II. The Voluntary Payment doctrine cannot apply.

A. Payment is not "voluntary" when fees are mandated by law and, if not paid, would subject the non-payor to substantial fines and imprisonment.

The Amicus Brief asserts that the voluntary payment doctrine bars Appellants' claims. *See* Am. Br. at p. 17. But the payment of both fees was (City of Aiken) and is (Aiken County) mandated by law, and subject to fines and imprisonment if not paid, as discussed more fully below. There can be no "voluntary" payment in this case.

The voluntary payment doctrine does not apply where payment is made as a result of duress, coercion, or compulsion. *Hardaway v. Southern Ry. Co.*, 90 S.C. 475, 72 S.E. 1020, 1025 (1912). More than 70 years ago, the South Carolina Supreme Court noted that "[t]he modern

tendency is toward a relaxation as to what is essential to constitute duress." *Baker v. Allen*, 220 S.C. 141, 149, 66 S.E.2d 618, 621–22 (1951). The duress / coercion exception applies to situations, like the present, in which failure to pay a tax would result in significant fines, penalties, or sanctions. *See, e.g., Lowenburg v. City of Dallas*, 261 S.W.3d 54, 58-59 (Tex. 2008) (availability of criminal sanctions and monetary penalties for nonpayment of tax rendered payment involuntary under coercion exception to voluntary payment rule); *Maximum Mach. Co., Inc. v. City of Sheperdsville*, 17 S.W.3d 890, 893 (Ky. 2000) ("In every case where enforcement may be had in a summary proceeding or a burdensome penalty may be exacted for failure to pay, the law will presume payment to have been made involuntarily and will permit recovery."); *Cmty. Fed. Sav. & Loan Ass'n v. Dir. of Revenue*, 752 S.W.2d 794, 797 (Mo. 1988) ("Payment to avoid harsh penalties is not voluntary payment of taxes."); *Ball v. Village of Streamwood*, 665 N.E.2d 311, 318 (Ill. App. 1996) (payment of municipal taxes without protest was under duress because ordinance provided for civil penalties and fines for failure to pay); *City of Miami v. Florida Retail Fed'n, Inc.*, 423 So.2d 991, 993 (Fla. Ct. App. 1982) (finding financial sanctions for nonpayment sufficient to render payment without protest involuntary).

Had Appellants failed to pay the road maintenance fees charged to them each year by the City and County, they would have been subject to significant fines and imprisonment. Specifically, Aiken County Ordinance Number 92-5-19, which enacted its road maintenance fee, includes the following penalty:

> **Sec. 19-37. - Penalty for nonpayment.** In the event an individual does not pay the assessed road user fee and operates his vehicle on any county road, the individual shall pay a fine of up to two hundred dollars ($200.00) and/or serve a sentence of thirty (30) days in jail, which offense shall be tried in magistrate's court.

Likewise, City of Aiken Ordinance Number 06202016 included the following, virtually identical penalty:

> **Sec. 36-2. - Penalty for nonpayment.** In the event an individual does not pay the assessed road user fee and operates his vehicle on any city road, the individual shall pay a fine of up to two hundred dollars ($200.00) and/or serve a sentence of thirty (30) days in jail, which offense shall be tried in municipal court.

Appellants' payment of these fees to avoid the harsh penalties set by the ordinance cannot be "voluntary." As such, this case fits squarely within the duress / compulsion exception to the voluntary payment doctrine.

Moreover, Appellants' payment of the road maintenance fees without knowledge of the illegality is not voluntary. Payments made pursuant to a legal obligation are inherently involuntary. *See Genesis Ins. Co. v. Wausau Ins. Companies*, 343 F.3d 733, 738 (5th Cir. 2003). The Restatement recognizes that "[i]n a business setting, it is at least paradoxical to suppose that the overpayment of an asserted (or any payment of a nonexistent) liability could ever be 'voluntary,' and the proper operation of the voluntary payment rule must be realistic rather than artificial." *Id*. Under the Restatement approach, payments are considered voluntary only when the taxpayer pays without protest and with actual knowledge that the assessment is erroneous or illegal. Restatement (Third) of Restitution, § 19 (2011), Comment h. In other words, a voluntary payment occurs only where the taxpayer has assumed a recognized risk that the tax may not be owed by electing to pay rather than challenge the assessment. *Id*. A payment made in error or without knowledge that an assessment was invalid is not voluntary under such an understanding. *See Ves Carpenter Contractors, Inc. v. City of Dania*, 422 So.2d 342, 344 n. 3 (Fla. Ct. App. 1982) ("People pay taxes because of civic obligation and a keen awareness of the potential penalties for violating the tax laws. Thus, we respectfully suggest that it is sophistic to characterize a payment made in error as a voluntary payment.").

Appellants' prior payments of Respondents' road maintenance fees were not "voluntary" under any commonly-accepted meaning of the term. Appellants would be subject to fines and

imprisonment for failure to pay, and Appellants further did not know that the fees were illegal. Therefore, they could not have made an informed decision regarding whether to pay or not. The notion that Appellants payment of the taxes under these circumstances was in any way "voluntary" defies the law, logic, and the basic definition of the word. Consequently, the voluntary payment doctrine cannot apply.

B. The Voluntary Payment doctrine is not a valid defense to a claim for the return of illegal taxes or fees assessed.

No reported South Carolina decision has applied the voluntary payment doctrine to bar a claim for an illegal tax or fee refund in nearly a century. *See City of Columbia v. Peurifoy*, 148 S.C. 349, 146 S.E. 93 (1928). The last time a South Carolina appellate court even recognized the doctrine in connection with a claim for recovery of taxes was more than 70 years ago in *Baker v. Allen*, 220 S.C. 141, 149, 66 S.E.2d 618, 621–22 (1951). Even then, the Supreme Court recognized the unjust effect of its strict application. *Baker*, at 149, 66 S.E.2d at 622 ("The strict rule above mentioned has undoubtedly worked an injustice in many instances.").

The most recent Restatement (Third) of Restitution expressly recognizes a cause of action for unjust enrichment for recovery of taxes erroneously or illegally assessed and effectively eliminates the voluntary payment doctrine as a defense. Restatement (Third) of Restitution and Unjust Enrichment §§ 6, 19 (2011). The Comments to Restatement § 6 explain that "[t]he fact that 'voluntary payment' can be invoked to deny refunds to taxpayers who have paid taxes they did not owe should be enough, in itself, to discredit the disingenuous application of this misunderstood doctrine." Restatement (Third) of Restitution, § 6, Comment e (2011) The Reporter's Notes further state that the doctrine "is much abused, but rarely with the mendacity of the decisions that deny restitution of taxes on the ground that payment was 'voluntary.'" Restatement (Third) Restitution, § 19, Reporter's Notes Comment h (2011).

Given the decline of the voluntary payment doctrine generally, and its disappearance from South Carolina law over the past half-century, it no longer represents a viable defense in this State to a claim for recovery of taxes wrongfully assessed and, in any event, clearly cannot support dismissal on the pleadings.

C. Equity and fairness demand the return what is owed to Appellants and the citizens of political subdivisions who have illegally collected these Road Maintenance Fees.

Appellants have asserted a cause of action for unjust enrichment to Respondents. Consistent with these principles, the Restatement now expressly provides for recovery in restitution by a taxpayer of taxes erroneously assessed, without regard to the availability of a specific statutory provision for refund. Restatement (Third) of Restitution and Unjust Enrichment, § 19 (2011) ("[T]he payment of tax by mistake, or the payment of a tax that is erroneously or illegally assessed or collected, gives the taxpayer a claim in restitution against the taxing authority as necessary to prevent unjust enrichment.").

Courts in other jurisdictions follow the restatement approach. *Kragnes v. City of Des Moines*, 810 N.W.2d 492, 512 (Iowa 2012) (citing Restatement to provide recovery of franchise fees illegally assessed by the city); *In re New Jersey State Board of Dentistry*, 423 A.2d 640, 643 (N.J. 1980) (where a tax has been ruled invalid, the taxing entity "has not a particle of right to the money in question, which is due to the taxpayer according to the principles of common honesty"); *Owens v. Floyd County*, 95 S.E.2d 389, 391-392 (Ga. App. 1956) (claim in restitution for money had and received lies where county refused to return fees paid by taxpayer under mistake of law). In ordering the municipality to pay restitution to the taxpayers in *Kragnes*, the Iowa Supreme Court stated that its conclusion was "strongly influenced" by the fact that the municipality continued to collect the invalid tax after being put on notice of the claimed illegality. *Kragnes*, at 513.

Appellants' claims fit squarely within the Restatement and cases cited above discussing illegal taxes collected from the taxpayer. Appellants alone paid hundreds of dollars to Respondents that they did not owe. Even now, knowing of the illegality,[4] Respondent Aiken County continues to collect this fee, and both Respondents continue to hoard the fees already collected. Under these circumstances, equity and fairness require Respondents to repay what does not belong to them.

D. Voluntary Payment should not be decided at the Pleadings Stage.

The determination of whether taxes were paid voluntarily and whether the voluntary payment doctrine should apply "cannot be answered on the pleadings." *Baker v. Allen*, 220 S.C. 141, 151–52, 66 S.E.2d 618, 623 (1951). In *Baker*, the South Carolina Supreme Court reversed the trial grant of summary judgment based on the voluntary payment doctrine, holding that "whether duress or compulsion exists in a particular transaction is ordinarily a question of fact depending on the situation of the parties and all the surrounding circumstances." *Id*. at 152, 66 S.E.2d at 623. Without reaching the merits, the application of the voluntary payment doctrine is a question of fact that cannot be decided on the pleadings. *Baker*, at 151, 66 S.E.2d at, 623. In sum, however, this doctrine is no longer a viable defense in South Carolina to a valid claim for a refund of illegal or wrongfully collected taxes or fees.

CONCLUSION

For the foregoing reasons and those reasons set forth in Appellants Brief and Reply Brief, the decision of the circuit court should be REVERSED and REMANDED.

[4] And indeed, Respondent City of Aiken repealing its road maintenance fee as an implied admission of its illegality.

Respectfully submitted,

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