IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

DISCOUNT SLEEP OF OCALA, LLC
D/B/A MATTRESS WAREHOUSE,
INDIVIDUALLY, AND AS A
REPRESENTATIVE OF A CLASS OF ALL
SIMILARLY SITUATED OTHERS,
AND DALE W. BIRCH, INDIVIDUALLY, ETC.,

Appellants,

v. Case No. 5D19-1899

CITY OF OCALA, FLORIDA,

Appellee.

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Opinion filed June 19, 2020

Appeal from the Circuit Court
for Marion County,
Lisa D. Herndon, Judge.

Derek A. Schroth, James A. Myers, and Sasha O. Garcia, of Bowen/Schroth, Eustis, for Appellants.

George Franjola, of Gilligan, Gooding, Franjola & Batsel, P.A., Ocala, and Patrick G. Gillgan, of Gillgan, Gooding, Batsel & Anderson, P.A., Ocala, for Appellee.

ORFINGER, J.

Discount Sleep of Ocala, LLC d/b/a Mattress Warehouse, and Dale W. Birch, individually and as representatives of a class of others similarly situated ("Appellants"),

appeal a final judgment in favor of the City of Ocala ("the City"), determining that the City's fire service fee was a valid user fee, not an unlawful tax, and that Appellants' cause of action was barred by the statute of limitations. We reverse.

FACTS

Between 2006 and 2010, the City enacted several ordinances that established, repealed and then re-established a fire service fee. See Disc. Sleep of Ocala, LLC v. City of Ocala, 200 So. 3d 156, 157 (Fla. 5th DCA 2016) ("Discount I"). The fee was intended to offset a portion of the general operating costs of the City's fire department. The City began assessing the fee in 2006, but repealed it effective October 8, 2009, by enacting Ordinance 6015. Id. Ordinance 2010-43, enacted by the City on May 4, 2010, then re-established the City's fire service fee.[1]

On February 20, 2014, Appellants filed a class action lawsuit against the City, alleging that the City's fee was an unconstitutional tax imposed in violation of article VII, section (1)(a) of the Florida Constitution. Appellants asked the trial court to declare the City's fire service fee unlawful and order class-wide refunds to the greatest extent permitted by law. In response, the City moved to dismiss the complaint, contending that the statute of limitations had expired. The trial court agreed and dismissed the case with prejudice. We reversed, ruling that the City repealed its original ordinance imposing the fire service fee effective October 8, 2009, and the enactment of Ordinance 2010-43, re-establishing the fire service fee, "triggered a new 4-year statute of limitations." Discount

[1] Although the fee was repealed for about seven months, the City never stopped charging and collecting it.

I, 200 So. 3d at 157. We concluded that Appellants' claims were timely and that the trial court erred in granting the motion to dismiss. Id.

When the matter returned to the trial court, Appellants sought to certify a class of all those who paid the City's fire service fee from and after February 20, 2010 (four years prior to the filing of the initial complaint). The trial court denied class certification and again ruled that the City never repealed the fire service fee. We reversed again, concluding that the trial court erred in denying class certification. Disc. Sleep of Ocala, LLC v. City of Ocala, 245 So. 3d 842, 857 (Fla. 5th DCA 2018) ("Discount II"). We also rejected the City's argument, for a second time, that the fire service fee had never been repealed, writing:

> Our decision in [Discount I], which determined the fire service user fee was repealed based on the plain language of Ordinance 6015, governs this case. See Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) (explaining that appellate courts' decisions "represent the law of Florida unless and until they are overruled by [the Florida Supreme] Court"). Thus, the trial court was without authority to find that the original fire service user fee was never repealed.

Id. at 857 n.1. When the matter again returned to the trial court, following a non-jury trial, the court entered final judgment for the City, concluding that the City's fire service fee was not a tax, but a valid user fee, and that Appellants' cause of action was barred by the statute of limitations.

ANALYSIS

On appeal, Appellants challenge both the trial court's rulings that the City's fire service fee is a valid user fee and that their class claims are barred by the statute of limitations. Both issues present pure questions of law that we review de novo. See City of Hollywood v. Mulligan, 934 So. 2d 1238, 1241 (Fla. 2006) (reviewing constitutionality

of ordinance de novo); Foley v. Azam, 257 So. 3d 1134, 1137 (Fla. 5th DCA 2018) (reviewing statute of limitations issues de novo).

I. IS THE FIRE SERVICE FEE A VALID USER FEE OR AN INVALID TAX?

We first consider whether the City's fire service fee is a valid user fee or an invalid tax. A tax is a burden imposed "by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called on to perform." Collier Cty. v. State, 733 So. 2d 1012, 1018 (Fla. 1999) (quoting Klemm v. Davenport, 129 So. 904, 907 (Fla. 1930)). The purpose of taxation is to provide funds for the general welfare and protection of the citizens. City of Daytona Beach v. King, 181 So. 1, 4 (Fla. 1938). Except as provided by general law, local governments have no authority to levy taxes other than ad valorem taxes. Collier Cty., 733 So. 2d at 1014. However, local governments do possess the authority to impose special assessments and user fees. Id.; see §§ 166.201, 170.01, Fla. Stat. (2014); State v. City of Port Orange, 650 So. 2d 1, 3–4 (Fla. 1994).

User fees are charges paid in exchange for the right to use a government-provided service or instrumentality. City of Gainesville v. State, 863 So. 2d 138, 144 (Fla. 2003). Three traits distinguish a valid user fee from a tax. Unlike a tax, a valid user fee (1) is "charged in exchange for a particular governmental service"; (2) the service "benefits the party paying the fee in a manner not shared by other members of society"; and (3) the fee is "paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge."[2] City of Port Orange,

[2] Examples of valid user fees include those charged for utilities such as water, sewer service, electricity, or to use a city tennis court. See, e.g., City of Gainesville, 863 So. 2d at 147–48 (upholding city's flat fee on properties to maintain stormwater

650 So. 2d at 3. To be valid, a user fee must satisfy all three requirements, see City of Miami v. Haigley, 143 So. 3d 1025, 1029–32 (Fla. 3d DCA 2014), with the first two prongs being more significant, I-4 Commerce Ctr, Phase II, Unit I v. Orange Cty., 46 So. 3d 134, 136 (Fla. 5th DCA 2010).

1. Was the fee paid in exchange for a governmental service?

The first requirement of a valid user fee is that it must be paid in exchange for a particular governmental service. City of Port Orange, 650 So. 2d at 3. Typically, the amount paid for the service must bear a reasonable relationship to the value of "actual goods or services provided" and the benefit conferred on the payor. City of Gainesville, 863 So. 2d at 145 (quoting 70C Am. Jur. 2d Special or Local Assessments § 2, at 631–32 (2000) (footnotes omitted)).

Appellants argue that the City's fee fails this prong of the test because it is not charged in *exchange* for fire service. As they point out, the City provides comprehensive fire response services to anyone within Ocala's city limits, regardless of whether the fee has been paid. The City counters that courts in this state have repeatedly upheld the constitutionality of mandatory user fees or availability charges regardless of actual use in many *utility* cases. The City contends its fire service should fall in this category. See, e.g., Pinellas Cty. v. State, 776 So. 2d 262, 268–69 (Fla. 2001) (upholding validity of mandatory availability charge for reclaimed water service); State v. City of Miami Springs, 245 So. 2d 80 (Fla. 1971) (ruling that flat rate for sewer charges for all single family residences, unrelated to actual use, was not unreasonable, arbitrary or in conflict with state or federal

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management system); Pinellas Cty. v. State, 776 So. 2d 262, 268 (Fla. 2001) (finding county's availability charge for reclaimed water service was valid user fee).

constitutions or laws); I-4 Commerce Ctr, 46 So. 3d at 136–37 (finding readiness-to-serve/capacity cost component of county's wastewater rate schedule was not contrary to constitutional standards); City of Riviera Beach v. Martinique 2 Owners Ass'n, 596 So. 2d 1164 (Fla. 4th DCA 1992) (holding that solid waste removal ordinance applied to unoccupied condominiums without regard to actual use).

But the provision of fire service is not a utility. Moreover, the mandatory utility fees in the cases cited by the City, Pinellas County and I-4 Commerce Ctr, for example, were also approved, in part, because they were authorized by acts of the Legislature. See Pinellas Cty., 776 So. 2d at 664–68 (finding "special laws" passed by Legislature gave county ability to charge fee for reclaimed water improvements added to existing water and sewer system); I-4 Commerce Ctr, 46 So. 3d at 137 (noting that wastewater charges are authorized by section 153.11, Florida Statutes). Particularly for water and sewer services, municipalities have statutory authority to impose connection and usage fees. See § 153.11, Fla. Stat. (2014). The only requirement is that the fees must be "just" and "equitable," see section 153.11(1)(c), and "[t]he lack of actual use does not render a fee unjust or inequitable," I-4 Commerce Ctr, 46 So. 3d at 137. In contrast, there are no statutes or other special acts of the Legislature that give municipalities broad authority to raise revenue for fire services outside of ad valorem taxes or, perhaps, a special assessment.[3]

The fire service fee is used to fund the typical "functions the sovereign is called on to perform"—those advancing the general welfare and protection of its citizens that are

[3] The City did not impose the fee as a special assessment in compliance with sections 197.3632 and 197.3635, Florida Statutes. Hence, we do not consider whether a special assessment to fund fire services would pass constitutional muster.

funded through taxes, not user fees. See City of Port Orange, 650 So. 2d at 3 (distinguishing tax from user fee, noting that "tax is an enforced burden imposed by sovereign right for the support of the government, the administration of law, and the exercise of various functions the sovereign is called on to perform"). Thus, we conclude the City's fee is a charge that is not paid in exchange for a service, is not specifically authorized by statute, and is used to provide a service typically funded from ad valorem taxes. As a result, the fee fails the first prong of the City of Port Orange test.

2. Do the class members benefit in a manner not shared by others not paying the fee?

The second requirement of a valid user fee is that in exchange for the fee, the payor benefits in a manner not shared by other members of society. Here, the trial court found that the fire service fee benefitted class members by lowering their fire insurance premiums, protecting the lives of the class members and other occupants of developed property, and by preventing the spread of fires to adjoining properties.[4] Appellants observe that in making this finding, the trial court relied on cases upholding the validity of *special assessments*—not user fees. They also argue that the fee fails the benefit prong because they receive no added benefit from paying the fee—receiving the same emergency services as those provided to non-payors.

The Florida Supreme Court has upheld *special assessments* collected to fund fire services when, as here, all property owners received the same benefit. See Morris v. City of Cape Coral, 163 So. 3d 1174, 1178 (Fla. 2015); Fire Dist. No. 1 of Polk Cty. v. Jenkins, 221 So. 2d 740, 741–42 (Fla. 1969). We recognize that the line between special

[4] These benefits apply to property owners as well as renters.

assessments and user fees is a blurry one, see City of Gainesville v. Fla. Dep't of Transp., 778 So. 2d 519, 526 (Fla. 1st DCA 2001), but there is overlap in the analysis of the benefit provided to the payor. Much like a valid user fee requires that the payor benefit in a way not shared by others not paying the fee, a valid special assessment requires that the payor receive a "special benefit" that bears a "logical relationship" between the services provided and the benefit to the real property. Lake Cty. v. Water Oak Mgmt. Corp., 695 So. 2d 667, 669 (Fla. 1997). And,

> [i]n evaluating whether a special benefit is conferred to property by the services for which the assessment is imposed, the test is not whether the services confer a "unique" benefit or are different in type or degree from the benefit provided to the community as a whole; rather, the test is whether there is a "logical relationship" between the services provided and the benefit to real property.

Id. We see no reason to interpret the "special benefit" required of a valid special assessment differently than the "benefit not shared by other members of the society" required for a valid user fee. While class members and non-class members alike have access to the same fire services, class members receive financial benefits not shared by others, which are attributable to the fire protection that the City provides, such as lower insurance premiums. Hence, we find no error with the trial court's ruling on this prong of the test.

3. Was the fee paid by choice?

The final requirement of a valid user fee is that it must be paid by choice, meaning those paying the fee have "the option of not utilizing the governmental service and thereby avoiding the charge." City of Port Orange, 650 So. 2d at 3. This is distinct from a tax, which is compelled. Id. The trial court suggested that the class members have two ways to avoid paying the fee—they could choose not to pay the fee, which would require

disconnecting from the City's water, sewer and electric service, or could choose to move outside the City limits. Neither presents a meaningful choice.

First, the class members cannot refuse the fire department's services. And, the fire service fee appears on the class members' utility bill along with charges for water, sewer and electric services, as those services are all provided by the City. If a class member failed to pay the fire service fee, the City will disconnect that person's utility services—water, sewer, and electric. See Ordinance 70-686. Further, the Ordinance provides that unpaid fire service charges constitute a lien on the property to which the service was provided. The lien is then "treated as [a] special assessment lien against the real property, and . . . shall remain in equal rank and dignity with the lien of ad valorum [sic] taxes." Id. This makes disconnecting from the City's utility services to avoid the fire service fee an illusory choice at best.

The City's bundling the fire service fee with water, sewer and electric charges is coercive and deprives the payor of a free choice. The Florida Supreme Court has held that similar bundling of objectionable fees with legitimate charges amounts to economic coercion. In New Smyrna Inlet District v. Esch, 137 So. 1 (Fla. 1931), a taxing district imposed special assessment taxes on Esch and others to construct and maintain an inlet waterway. Esch sued to recover the assessment, claiming it was unlawful. The supreme court ruled for Esch and explained that when a tax is illegally enacted and is collected along with other valid taxes, the taxpayer has no choice but to pay the unlawful charge. Esch, 137 So. at 4. The court held that bundling of illegal and legal fees in this way created sufficient coercion that rendered Esch's payment involuntary, permitting Esch to recover

the illegally paid taxes. Id. Here, the payments made by Appellants were the product of similar economic coercion.

The other option to avoid the fee suggested in the trial court's order—moving outside the City limits—is also not a real choice. In City of Port Orange, the supreme court rejected this notion, holding that the transportation utility charge imposed by the city against those whose only choice was owning property within the boundaries of the municipality rendered the fee a mandatory tax and not a valid user fee. 650 So. 2d at 4. The same is true here.

We conclude that Appellants had no choice but to pay the fire service fee that the City tacked onto their utility bills. The only options to avoid payment were to forgo the City's water, sewer and electric services—all unrelated to fire service—or to move outside of the City. Neither presents a real choice.

II. THE CITY'S DEFENSES.

A. Statute of limitations defense.

The trial court also ruled that the class claims were barred by the applicable four-year statute of limitations, see section 95.11(3)(p), Florida Statutes (2014), because it concluded that Ordinance 6015 did not repeal the fire service fee. As a result, the trial court concluded the fee had been charged continuously since 2006, meaning the class claims fell outside the limitations period.

The trial court's ruling directly contradicts our holding in Discount I, reiterated in Discount II, that Appellants' class claims were not barred by the statute of limitations. Specifically, we found that the unambiguous language of Ordinance 6015 made it clear

that the fire service fee was repealed when the Mayor signed Ordinance 6015. Our decisions in Discount I and Discount II are the law of the case and bound the trial court.

The law-of-the-case doctrine is a principle of judicial estoppel that applies when multiple appeals are taken in the same case. Fla. Dep't of Transp. v. Juliano, 801 So. 2d 101, 102 (Fla. 2001). Questions of law and issues decided by the appellate court in resolution of a first appeal become the law of the case and govern all subsequent proceedings. Suffolk Constr. Co. v. First Sealord Sur., Inc., 63 So. 3d 18, 19 (Fla. 3d DCA 2011). Absent extraordinary circumstances, the decision of an appellate court in an earlier appeal is binding on the trial court on remand and on the appellate court in a subsequent appeal. United Auto. Ins. Co. v. Comprehensive Health Ctr., 173 So. 3d 1061, 1065 (Fla. 3d DCA 2015).

The trial court justified avoiding Discount I by concluding that this Court ruled on an incomplete record. The trial court believed that had we not ruled at an early stage in the litigation and been privy to all the pertinent facts, Discount I would have come out differently. According to the trial court, the record made clear that the clause in the repealing Ordinance, stating the "ordinance shall take effect upon approval by the mayor," was never meant to be included in Ordinance 6015. Thus, the trial court found that the legislative intent of the City Council required it to find that the repeal never took effect.

This assessment is flawed. We did not rule on an incomplete record. In Discount I, the City made the same argument it made at trial and again in this appeal—that the City Council had not intended for the repeal to take effect when the Mayor signed the Ordinance and that the City Council's intent must be given effect even though it contradicted the plain language of the Ordinance. We rejected that argument because

the plain language of the Ordinance made clear that the repeal became effective on the Mayor's signing. It is well-established that the best indicator of legislative intent is the statutory text itself. Borden v. E.-European Ins. Co., 921 So. 2d 587, 595 (Fla. 2006). And, "[w]hen the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." Daniels v. Fla. Dep't of Health, 898 So. 2d 61, 64 (Fla. 2005). Accordingly, the plain text of Ordinance 6015 controls. Discount I is the law of the case, and the trial court erred in its judgment that Appellants' claims are time barred.

B. Voluntary payment and good faith defenses.

The City also asserted the affirmative defenses of voluntary payment and good faith. As a general rule, "a taxpayer is normally entitled to a refund of taxes paid pursuant to an unlawful assessment." Coe v. Broward Cty., 358 So. 2d 214, 216 (Fla. 4th DCA 1978); see also Esch, 137 So. at 4. But the common law voluntary payment defense can preclude a refund when the party seeking a refund paid the illegal tax voluntarily. Broward Cty. v. Mattel, 397 So. 2d 457, 459 (Fla. 4th DCA 1981). However, the voluntary payment defense does not apply when the payment has been made under compulsion or coercion. See Jefferson Cty. v. Hawkins, 2 So. 362, 365 (Fla. 1887) ("[I]llegality of the demand paid constitutes of itself no ground for relief, but there must be, in addition, some compulsion or coercion attending its assertion which controls the conduct of the party making the payment."); Broward Cty., Fla. Bd. of Cty. Comm'rs v. Burnstein, 470 So. 2d 793, 795 (Fla. 4th DCA 1985) ("[P]ayment of a tax is involuntary where the penalty for nonpayment is so severe that it constitutes coercion and duress."). As we noted earlier, the consequences for a class member's failure to pay the fire service fee include the loss of

water, sewer and electric services and a lien on the property to which services are provided. This is economic coercion, making the payments involuntary. And, when as here, the levy of an illegal tax may become a cloud on the title to real property, payment of the tax to avoid the cloud or to avoid the imposition of a substantial burden on property rights is not a voluntary payment. See Esch, 137 So. at 4.

The City's good-faith defense likewise fails. In Gulesian v. Dade County School Board, 281 So. 2d 325, 326 (Fla. 1973), the Florida Supreme Court established a narrow defense to a taxpayer request for a refund when the governmental entity that unlawfully collected the charges (1) acted in good-faith reliance on a presumptively valid statute, and (2) a refund would impose an intolerable burden on the governmental entity.

Here, nothing in the record shows that the City meets either requirement. First, no statute specifically allows the City to charge a fire service fee. Second, the City did not show that a refund would cause an intolerable burden. The City suggests that it does not have the funds available for a refund as they were already spent providing fire services. But, as we explained in Discount II, the City has several ways to accommodate a refund, "including exploring an enactment, pursuant to chapter 197, of a lawfully authorized 'special assessment'; using a portion of the city 'reserves'; implementing bonds; selling the City's 'surplus property'; transferring funds from other city accounts; merger with other fire departments; pension reform; and choosing to reduce or eliminate certain services." 245 So. 3d at 852.

CONCLUSION

For these reasons, we reverse the final judgment, declare the City's fire service fee an unconstitutional tax, and remand for establishment of a common fund to refund the illegally collected fees.

REVERSED and REMANDED with Instructions.

EVANDER, C.J., and EISNAUGLE, J., concur.