RENDERED: APRIL 15, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000915-MR

SUZETTE SEWELL-SCHEUERMANN
AS TAXPAYER FOR THE USE AND BENEFIT
OF THE CITY OF AUDOBON PARK — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 13-CI-006719

MICHAEL SCALISE; ANNE BRAUN;
AL HUBER; JONATHAN LEACHMAN;
STEVE MILLER; JUDY SCHWENKER;
MARK STEVENS; AND GARY VOGEL — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, JONES AND THOMPSON, JUDGES.

JONES, JUDGE: This is an appeal from an order entered by the Jefferson Circuit Court dismissing the Appellant's claim for failure to state a claim upon which relief can be granted. For the reasons set forth below, we REVERSE and REMAND.

I. Background

The Appellant, Suzette Sewell-Scheuermann, is a resident and taxpayer of the City of Audubon Park ("the City"), a city of the fifth class located in Jefferson County, Kentucky. On December 27, 2013, the Appellant filed a civil action in Jefferson Circuit Court against the City's mayor, Michael Scalise, and seven members of the City Council: Anne Braun, Al Huber, Jonathan Leachman, Steve Miller, Judy Schwenker, Mark Stevens, and Gary Vogel.

The Appellant's complaint alleged that for fiscal years 2007-2008 beginning on July 1, 2007, to fiscal year 2012-2013, beginning on July 1, 2012, the City Council approved annual ordinances setting a sanitation tax ("the Sanitation Tax") for each year for the purpose of paying for sanitation services for the City, including garbage and trash collection, as well as recycling. Appellant further alleged that for each of these fiscal years, the City Council diverted a portion of the tax revenue generated from the Sanitation Tax and placed such funds in the City's general fund and that the Sanitation Tax revenue was expended on items unrelated to sanitation.[1]

Appellant charged that the Mayor and the City Council Members who voted to allow the expenditure of the Sanitation Tax revenue on unrelated items were in violation of Section 180 of the Kentucky Constitution, KRS[2] 92.330, and

[1] Appellant alleged the following amounts were diverted from the Sanitation Tax to expenditures of the City for items other than sanitation services: $131,200 in Fiscal Year 2008-2009; $161,600 in Fiscal Year 2009-2010; $161,000 in Fiscal Year 2010-2011; $161,600 in Fiscal Year 2011-2012; and $161,600 in Fiscal Year 2012-2013.

[2] Kentucky Revised Statutes.

KRS 92.340. Appellant demanded a judgment against the Mayor and the City Council Members as related to these alleged unauthorized expenditures.

The Mayor and the City Council Members moved to dismiss Appellant's complaint pursuant to CR[3] 12.02(f) on the basis that it did not state a cause of action upon which relief can be granted. Specifically, they argued that Appellant could not satisfy the requisite element of damages because the diverted funds were applied to the legal obligations of the City, and therefore, the City was not actually harmed. The circuit court agreed with the Appellees. It dismissed Appellant's complaint as follows: "[S]ince the diverted funds were never removed from the City's control and used only to pay the City's financial obligations, the Court does not see how the Plaintiff on behalf of the City, could be granted relief for any harm and damage suffered . . . Therefore the Court will grant Defendants' Motion to Dismiss."

This appeal followed.

II. Standard of Review

"Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo." *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010).

III. Analysis

[3] Kentucky Rules of Civil Procedure.

We begin by examining the constitutional and statutory provisions at issue. Section 180 of the Kentucky Constitution provides:

> Every act enacted by the General Assembly, and every ordinance and resolution passed by any county, city, town or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose.

KRS 92.330 specifically applies Section 180's restrictions to cities of the home rule class (second to sixth class). It further sets forth that such cities are only permitted to levy taxes by ordinance and that the ordinance must set out the purpose of the tax. Specifically, it provides:

> All taxes and license fees levied or imposed by cities of the home rule class shall be levied or imposed by ordinance. The purpose for which each tax is levied or license fee imposed shall be specified in the ordinance, and the revenue therefrom shall be expended for no other purpose than that for which the tax was levied or the license fee imposed. Failure to specify the purpose of the tax or license fee shall render the ordinance invalid.

KRS 92.340 creates a right of action when a city of the home rule class expends tax revenue for a purpose other than that for which the tax was levied or the license was collected. It states:

> If, in any city of the home rule class, any city tax revenue is expended for a purpose other than that for which the tax was levied or the license fee imposed, each officer, agent or employee who, by a refusal to act, could have prevented the expenditure, and the members of the city legislative body who voted for the expenditure, shall be jointly and severally liable to the city for the amount so expended. The amount may be recovered of them in an

> action upon their bonds, or personally. The city attorney shall prosecute to recovery all such actions. If he fails to do so for six (6) months after the money has been expended, any taxpayer may prosecute such action for the use and benefit of the city. A recovery under this subsection shall not bar a criminal prosecution. Any indebtedness contracted by a city of the home rule class in violation of this subsection or of KRS 92.330 or 91A.030(13) shall be void, the contract shall not be enforceable by the person with whom made, the city shall never assume the same, and money paid under any such contract may be recovered back by the city.

The City is a Kentucky city of the fifth class and therefore is covered under KRS 92.330 and 92.340. It is undisputed that the City expended the Sanitation Tax revenue on purposes other than those related to sanitation. It is likewise undisputed that the city attorney did not take action within six months.

Therefore, on its face, it appears that Appellant has satisfied all the elements necessary under KRS 92.340 such that the Appellees should be held to be "jointly and severally liable to the city" for the amount of sanitation tax revenue that they allowed to be expended for matters other than sanitation.

Despite the unambiguous nature of the statute, the circuit court dismissed Appellant's suit on the basis that the Appellees could not be held liable because the City suffered no damage in that the diverted funds were used for the benefit of the City. The circuit court concluded that no damages existed because the diverted funds in question "were never removed from the City's control and used only to pay the City's financial obligations." Yet, Appellant argues this is the

very action – using City funds taxed for one purpose and spending these funds for some other purpose – KRS 92.330 and 92.340 prohibit.

We agree with Appellant. KRS 92.330 and KRS 92.340 are clear and unambiguous. They mandate that cities state the purposes for their taxes in their levying ordinances and prohibit revenue generated under the levying ordinances from being used for any purposes other than those set forth in the ordinances. *See* KRS 92.330. The members of the city legislative body that vote to use any city tax revenue "for a purpose other than that for which the tax was levied or the license fee imposed . . . shall be jointly and severally liable to the city for the amount so expended." *See* KRS 92.340. We find no indication in the statutory language that the General Assembly intended to exempt liability if the officials use the funds on other city-related liabilities. The plain language of the statute suggests that *any* use of the funds for a purpose other than the purpose specified in the ordinance is prohibited and results in liability.

Furthermore, it is important to note that a prior statute, KRS 92.360, which would have permitted the City to transfer excess tax revenues to its general fund, was repealed by the General Assembly in 1980.[4] The General Assembly's enactment of KRS 92.330 and 92.340 and its repeal of KRS 92.360 provide clear

[4] KRS 92.360 provided:

> Where the special object or purpose for which a tax was levied by any city of the second to sixth class has been accomplished, any amount remaining in the special fund for that tax shall become a part of the general revenue fund of the city. . . . the city may return the [excess tax funds] to a special reserve fund for an object or purpose similar to that for which the fund was originally accumulated.

evidence that its intent was for liability to attach even when funds were used by the City as part of its general funds.

Despite the clear language set forth in the statute, the Appellees assert that since the tax revenues were applied to the legal obligations of the City, then Appellant cannot satisfy the requisite element of damages under any set of circumstances. To support their assertion, the Appellees rely heavily on *Field v. Stroube,* 103 Ky. 114, 44 S.W. 363 (Ky. 1898). First, as already noted, the statutes at issue were not in existence at the time *Field* was decided. Second, *Field* is distinguishable because the tax at issue there was levied for a discrete purpose: construction of a new courthouse in Bracken County. When the construction project was completed, money collected for the project was left over. It was impossible to use the levied funds for the intended purpose because that purpose had been fully achieved. When the diversion of the leftover money, "the surplus," was challenged, the Court held "when the object to be attained by the levy has been accomplished, and a surplus remains, it must be treated as a part of the general funds of the county and available for general county purposes." *Field*, 44 S.W. at 363. *Field* was distinguished later in *Lawrence Cty. v. Lawrence Fiscal Court*, 113 S.W. 824, 825 (Ky. 1908), for this very reason. In *Lawrence*, the court explained that in the case of taxes which repeat each year, leftover revenues generated in one year should be used for that purpose, either in the year levied or some other year. Unless the purpose for which the tax was levied has been extinguished, as was the case in *Field*, however, "revenue raised for road purposes,

for example, cannot be applied to educational purposes; and that a tax levied to build a courthouse cannot be used to repair a bridge[.]" *Id.*; *see also City of Ashland v. Bd. of Educ. of City of Ashland*, 149 S.W.2d 728, 729 (Ky. 1941) (distinguishing *Field*).

Unlike *Field*, where the construction project was completed, the "object to be attained" by the Sanitation Tax has not been accomplished, and indeed, since it is ongoing and enduring, it is reasonable to conclude that the object to be attained (ongoing waste disposal) has not been finally achieved, nor will it be attained in the reasonable future. If there is an excess after payment of the City's contract for sanitation, the City should use the excess funds for sanitation in the upcoming fiscal year since there is no way to refund a tax that was lawfully levied and collected. *Unemployment Comp. Comm'n v. Savage*, 140 S.W.2d 1073, 1078 (Ky. 1940) ("[W]e know of no authority for a return of a tax validly levied."). However, we believe it is clear from the statutes governing city taxation that the City may not levy a tax for an ongoing purpose – sanitation – year after year and use the excess for purposes unrelated to sanitation.

"An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation." *M'Culloch v. State*, 17 U.S. 316, 327, 4 L. Ed. 579 (1819). Appellees' interpretation of the statutes at issue would give them an unlimited ability to levy a tax that bears no proportion to the purpose of the tax and use the excess each tax

year after tax year for whatever other purposes they deem necessary. We believe the statutes relied on by Appellant were designed to thwart this very practice.

While Appellees have the power to levy a sanitation tax, they cannot use the revenues from that tax for any other purposes. If there is extra left at the end of the fiscal year, the excess must be used for sanitation in the following fiscal years. If Appellants violate KRS 92.330 and 92.340, they are jointly liable to the City. It is no defense under our current statutory scheme that the money they diverted was used to benefit the City in some other way.[5]

The statutes serve as a check for the very conduct that appears to have occurred in this case, *i.e.*, repeatedly levying a tax at a higher rate than is necessary for its stated purpose with the intent to use the extra funds for other purposes. Because a tax that has been collected under a valid ordinance cannot be refunded, the only recourse available is to require those who participated in this

---

[5] We pause to note that the statute in effect prior to 1942 created liability only where the city authorities passed an invalid ordinance, *i.e.*, an ordinance that did not state the purpose for the tax, and collected taxes under it. *See* § 3175:

> Ordinances levying taxes or imposing license fees shall distinctly specify the purpose or several purposes for which the same are levied; failure to do so shall render the ordinance invalid, and if it shall, the officer or officers, agents, or employees, who could, by a refusal to act, have prevented the expenditure and the members of the general council who voted for the expenditure, shall be jointly and severally responsible and bound to the city for the amount of such expenditure.

The present statute creates liability for spending taxes collected under a valid ordinance in contravention of the stated purpose in the ordinance. *See* KRS 92.340:

> If, in any city of the home rule class, any city tax revenue is expended for a purpose other than that for which the tax was levied or the license fee imposed, each officer, agent or employee who, by a refusal to act, could have prevented the expenditure, and the members of the city legislative body who voted for the expenditure, shall be jointly and severally liable to the city for the amount so expended.

The distinction between the statutes is subtle, but of great significance.

conduct to refund the money to the City so that it can be used in the future for the purpose for which it was collected. While the City may not have been "damaged" in the traditional sense, it is apparent that the statutes were violated. Our General Assembly has defined the statutory measure of damages for a violation of the statutes. The circuit court was without the statutory authority to carve out an exception to that measure of damage. Neither the statute nor the case law support exempting the Appellees under these facts. The City was damaged under the plain meaning of KRS 92.340 and the remedy for the violation is found within the statute, requiring Appellees to repay the City.

IV. CONCLUSION

For these reasons, the order of the Jefferson Circuit Court is REVERSED and this matter REMANDED to the trial court for additional proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. Dean Furman, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEES:

Carol S. Petitt
Kyle M. Vaughn
Louisville, Kentucky